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IN THE SUPREME COURT

of the

UNITED STATES

==========

October Term, 1981

No. A-126

==========

ROBERT ALLEN MAY,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

==========

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS OF TEXAS

==========

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PETITIONER'S LAWYERS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered on May 20, 1981, rehearing denied on July 15, 1981.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 618 S.W.2d 333, (Tex. Crim. App. 1981), and attached as Appendix "B".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1237(3), petitioner having asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

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QUESTIONS PRESENTED

I

WHETHER THE JURY SELECTION AT PETITIONER'S TRIAL VIOLATED THE STANDARDS SET BY THIS COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ADAMS V. TEXAS, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

II

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY FAILED TO MAKE A "BELL RINGING" OBJECTION TO THE ACTION IN EXCUSING JURORS FOR CAUSE EVEN THOUGH THEY WERE CLEARLY QUALIFIED UNDER WITHERSPOON.

III

WHETHER THE FAILURE OF PETITIONER'S COUNSEL TO OBJECT TO THE COURT'S EXCLUSION OF ONE WITHERSPOON-QUALIFIED JUROR UNDER THE INVALID STANDARDS OF SECTION 12.31(b) OF THE TEXAS PENAL CODE OPERATED AS A WAIVER OF PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS ESTABLISHED BY WITHERSPOON V. ILLINOIS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the foillowing provisions of Texas law:

TEXAS PENAL CODE SEC. 12.31. CAPITAL FELONY.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from

serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 37.071.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was

unreasonable in response to the provocation, if any, by the deceased.

(c) The State must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this Article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEXAS PENAL CODE, SEC. 19.02(a)(1). MURDER.

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual.

TEXAS PENAL CODE, SECTION 19.03(a)(3). CAPITAL MURDER.

(a) A person commits an offense if he commits murder

as defined under Section 19.01(a)(3) of this Code and:

(1) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration. . .

STATEMENT

Petitioner was convicted of hiring another for remuneration, to murder his step-father, Roy M. Ayotte, Jr. Represented by retained counsel, petitioner entered a plea of not guilty.

A jury in the 228th Judicial District Court of Harris County, Texas, found petitioner guilty and, by affirmative answers to the punishment issues, sentenced him to death.

Upon appeal to the Court of Criminal Appeals of Texas, petitioner's conviction and sentence were affirmed in an opinion set out in Appendix "B", post.

The constitutional issue presented by Question I arises from the jury selection. See Appendix "A".

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitoner's counsel did object as to three of the four jurors excused, and contended on appeal that the exclusion of these prospective jurors violated his right to a fair trial under this Court's holding in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

The Court of Criminal Appeals of Texas rejected this contention on the grounds that (1) petitioner's objections to the challenge for cause were directed toward 12.31(b), and not Witherspoon; therefore, such error was waived for purposes of appeal.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RULES OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ADAMS V. TEXAS, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581, WERE VIOLATED BY THE EXCLUSION FOR CAUSE

OF THREE PROSEPECTIVE JURORS WHO TESTIFIED THAT THE POSSIBLE IMPOSITION OF THE DEATH PENALTY MIGHT "AFFECT" THEIR DELIBERATIONS, WHERE PETITIONER'S COUNSEL DID OBJECT WHEN THE TRIAL COURT EXCUSED THESE PROSPECTIVE JURORS; ALTHOUGH THE MAGIC WORD "WITHERSPOON" WAS NOT UTTERED.

At petitioner's trial which began on March 6, 1978, three venire members were excluded in clear violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510, (1968). They were excluded under the same statute, Section 12.31(b) of the Texas Penal Code, and the same procedure, found to be constitutionally invalid by this Court in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

The Court of Criminal Appeals of Texas, in affirming petitioner's death sentence, further supported the affirmance by finding that petitioner's (1) objections were directed to 12.31(b), and not Witherspoon, notwithstanding their long-held position that 12.31(b) and Witherspoon were mutually exclusive, and that a Witherspoon objection at the time of this trial was unmeritorious when a juror was "affected" under 12.31(b).

As early as October 6, 1976, the Court of Criminal Appeals of Texas held there was no merit to an objection that it was improper to exclude a Witherspoon-qualified juror on the broader ground of Section 12.31(b) of the Texas Penal Code. Moore v. State, 542 S.W.2d 664 (Tex. Crim. App. 1976).

Even though petitioner's attorney did not object to the discharge of prospective juror Rein, the rule of constitutional waiver announced by this Court in Wainwright v. Sykes, 433 U.S. 72 (1977), is inapplicable under the facts of this case.

At the time these venire members were interrogated, the Court of Criminal Appeals of Texas had consistently held, for almost two years, that prospective jurors who indicate that their feelings on the death penalty would "affect" their deliberations on any of the fact issues submitted to them, were properly excused

under Section 12.31(b), regardless of whether their answers disqualified them under Witherspoon. Hovila v. State, 532 S.W.2d 293 (Tex. Crim. App. 1976); Smith v. State, 540 S.W.2d 677 (Tex. Crim. App. 1976); White v. State, 543 S.W.2d 104 (Tex. Crim. App. 1976); Shippy v. State, 556 S.W.2d 246 (Tex. Crim. App. 1977); Burns v. State, 556 S.W.2d 270 (Tex. Crim. App. 1977); Freeman v. State, 556 S.W.2d 309 (Tex. Crim. App. 1977); Hovila v. State, 562 S.W.2d 243 (Tex. Crim. App. 1978); Hughes v. State, 562 S.W.2d 857 (Tex. Crim. App. 1978).

Petitioner's counsel could only conclude from this unwaivering line of authorities that the court's rulings on the enumerated jurors were proper under the settled Texas law.

Even after this court's decision in Adams v. Texas, on June 25, 1980, the Court of Criminal Appeals of Texas sustained the exclusion of a Witherspoon qualified venireman under the ambit of Section 12.31(b), where no objection was made, again asserting that "Failure to object to the improper exclusion of a potential juror waives such error on appeal." Crawford v. State, 617 S.W.2d 925 (Tex. Crim. App. 1980).

The speciousness of this ruling was exercised in a dissenting opinion by Judge Roberts:

> "...[T]he Court can impose this waiver doctorine only by talking out of both sides of its constitutional mouth. On October 6, 1976, we held that there was no merit to an objection that it was improper to excuse a Witherspoon-qualified juror on the broader ground of Section 12.21(b). Moore v. State, 542 S.W.2d 664. Jury selection in this case began 6 months later (4/11/77). Now the Court holds that appellant was at fault for not raising an objection that we had 6 months earlier held to be legally worthless. At the least it is ingracious of us to require defense counsel to recognize merit in an argument when we could not; at worst, it denies him due process and due

course of law on appeal. It is tantamount to saying that our opinions on constitutional law are so notoriously untrustworthy that attorneys are not justified in following them."

Judge Roberts correctly recognized that an Adams or Witherspoon violation "affects the very fact finders."

This conclusion is supported by the post-Witherspoon cases cited by this Court in Davis v. Georgia, 429 U.S. 122 (1976), i.e., Wigglesworth v. Ohio, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); and Adams v. Washington, 403 U.S. 947, (1971).

In Gardner v. Florida, 430 U.S. 349 (1977), a plurality of the Court recognized that (1) the sentencing process of a capital murder trial must satisfy the requirements of the due process clause, and (2) the sentencing process of a capital murder trial is a critical stage of a criminal proceeding at which the accused is entitled to the effective assistance of counsel. There Mr. Justice Stevens, writing for the Court made the following comment where defense counsel made no objection to the trial court's consideration of a confidential report in assessing the death penalty, 430 U.S. at 360-362:

"Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. In this paraticular case, the only explanation for lack of disclosure [of the contents of the confidential report] is the failure of defense counsel to request access to the full report. That failure cannot

justify the submission of a less complete record to the reviewing court of a less complete record to the reviewing court than the record on which the trial judge bases his decision to sentence petitioner to death.

Nor do we regard this omission by counsel as an effective waiver of the constitutional error in the record. There are five reasons for this conclusion. First, the State does not urge that the objection has been waived. Second, the Florida Supreme Court has held that it has a duty to consider the 'total record' . . .when it reviews a death sentence. Third, since two members of that court expressly considered this point on appeal in this case, we presume that the entire court passed on the question. . . Fourth, there is no basis for presuming that the defendant himself made a knowingly and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report. . ." [emphasis added]

Mr. Justice Stewart, writing for the Court in Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973), noted:

"A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair and criminal trial.

Any trial conducted in derogation of that model leaves open the possibility that the trial reached a fair result precisely because all the protections specified in the Constitution were not provided."

It seems clear from the actions of this court that the "harmless error" rule, as applied to Witherspoon, has gone with the wind. Davis v. Georgia, supra. Moreover, it is obvious that the doctorine of waiver by failure to object does not apply to Wither-

spoon -- there was no objection in Witherspoon itself, nor in Maxwell v. Bishop, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970); and in Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969) the defense actually "assented" to exclusions, as did the defense in State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969) [holding defendant waived Witherspoon error], reversed per curiam in Wigglesworth v. Ohio, supra. Also in Harris v. State, 457 S.W.2d 903 (Tex. Crim. App. 1970) [holding that Witherspoon error was waived -- failure of defense to object], reversed in Harris v. Texas, 463 U.S. 947, 91 S.Ct. 2291, 29 L.Ed. 2d 859 (1971). See also Alderman v. Austin, 498 F.Supp. 1134 (1980).

Both Witherspoon and Adams specify the constitutional model required in all capital trials. The mandate is explicit: Witherspoon is "a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams v. Texas, supra.

It seems evident that trial counsel cannot, in a capital trial, grant the state a right to exclude prospective jurors on grounds impermissible under Witherspoon and outside the State's power of exclusion under the Constitution of the United States. It seems equally evident that the State cannot claim waiver of a right outside its power to curtail.

CONCLUSION

Petitioner prays that his petition for writ of certiorari be granted and that the sentence of death imposed in this cause be set aside as required by Witherspoon and Adams.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KEN J. MCLEAN, hereby certify that a copy of this petition was mailed, postage prepaid, on September 9, 1981, to Honorable Mark White, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711 and to the Honorable John B. Holmes, Jr., District Attorney, Harris County, Texas, 201 Fannin Street, Suite 200, Houston, Texas 77002.

KEN J. MCLEAN

APPENDIX "A"

After introducing himself and the attorneys, and advising Schlosser of the charge against petitioner, as well as the mandatory penalties, the trial judge continued,

> "Now, would the fact that . . . two possible punishments of life or death . . . would that affect your deliberations on any fact issue in the case? ***
>
> I'm really trying to find out how you feel about the imposition of the death penalty. Now you would be disqualified unless the penalties of death or imprisonment for life will not affect your deliberation on an issue of fact.
>
> Would the mandatory penalty of death or life imprisonment affect your deliberation on any issue of fact?
>
> A: No sir."

(R.A. 1598)

The Court informed Schlosser that the attorneys would "go into the principles of law involved" in the case and cautioned that the jury is required to take an oath to follow those principles and base its decision solely upon the evidence. (R.A. 1599) At this point the prosecutor took over, and during his preliminary comments told Schlosser that Appellant was indicted for hiring another to kill the alleged victim; he explained that such conduct constituted a capital offense in Texas. He then asked Schlosser whether "he agreed or disagreed" with the law. (R.A. 1603). Schlosser replies that it may be more the responsibility of the man that actually pulled the trigger (R.A. 1604). The prosecutor replied:

> "Now, the law provides that the person who does the hiring is subject to the maximum penalty of life or death also.*** This Defendant is charged with that. He is not charged with doing the murder itself.
>
> A. I would have to follow the law as a Juror.

(R.A. 1605)

> *** Could you follow the law if the Court tells you that hiring is subject to the . . . penalties of death or life imprisonment?

(R.A. 1605)

> *** I'm not going to try to talk you into a position one way or the other. *** If you disagree with the law or if you think in your own mind you couldn't put out of your mind the way you feel, that's fine.*** Now if you disagree with (the law) or if you don't think that ought to be the law or you don't think looking in your own mind, as only you can see, that

you could be fair to the State, we could just like to know about it now.

(R.A. 1605; R.A. 1606)

A. Well, I believe in capital punishment. If a man sheds another man's blood, then by that man that blood should be required. It seems to me that the man that actually did the murder would be the one ... subject to capital punishment.

(R.A. 1606)

Q. Under our law he is (too)*** What are your feelings about the person who actually does the hiring?

(R.A. 1606; R.A. 1607)

A. I would have to go by the law. I'm here to abide by the law.

Q. BUT HOW ARE YOUR FEELINGS?

A. I couldn't . . . give you a yes or no answer on that . . . without studying it and thinking about it.

(R.A. 1607)

Q. Well. . . after you are on the jury that's too late to give us an answer. That's what this is all about. . .to see how you feel.*** If you don't think sir, that you could sit fairly on that type of jury, just let us know. I know you will obey the law as best as you can, but sometimes our personal feelings, you know, are important to us. However you feel makes no difference to me. If you can, If you cannot, just let us know.

(R.A. 1607)

A. I really couldn't decide. . . right now. . . on whether I could sit, you know, with an open mind on his situation.

THE COURT: He's not asking what you are going to do in this case. He is asking about your attitude towards capital punishment. The question is: Do you believe in capital punishment as applied to a person who hires. . . someone to do the killing?

MR. SCHLOSSER: That's where my problem is.

THE COURT: You have to answer--

MR. SCHLOSSER: I don't think I could.

MR. POE: (Prosecutor) Excuse me. Are you through your Honor?

THE COURT: Yes.

(R.A. 1608; R.A. 1609)

Q.*** The answers we need from you are yes or no. I know it's human nature and I can say it all the time -- I believe I could, or I don't think I could.

But, the Judge, in order to make a ruling (of) law, requires you to answer yes or no to the questions.

So I will just ask you again, knowing what you know, the Defendant is not the trigger man in this case, I will tell you he's not, but is charged with capital murder.

MR. HOUSE: (Defense Counsel) I object to this type of questioning the problem is he's getting into the facts of the case. . . If he wants to present it in a hypothetical type question, that's fine.

MR. POE: I have a right to tell him what he is charged with.

THE COURT: Overruled.

MR. SCHLOSSER: I would have to say no.

(R.A. 1610, R.A. 1611)

Q: You could not sit fairly to the State knowing the Defendant is charged with doing the hiring as opposed to actually pulling the trigger; is that right?

A: Right.

Q: I think that was a yes answer?

A: Yes.

Q: And you thought this and you have come to the conclusion in your own mind, that you really couldn't be totally fair to the State because of the nature of the offense he is charged with: Is that correct?

A: That's correct.

Q: And although you could be totally fair in another type case of capital murder case, you couldn't be fair in this case because he is not the trigger man.

A: That's correct.

Q: Is that your answer for the Record and for the Court?

A: Yes.

Q: I take it I could spend the rest of the day talking to you about that and that would still be your answer, would it not?

A: Yes.

MR. POE: We will challenge him your Honor.

(R.A. 1611; R.A. 1612)

BY MR. HOUSE:

Q: Mr. Schlosser, the question really boils down to the fact that in a proper case, regardless of what the circumstances may be -- because what you don't know the circumstances and you don't know the facts and you won't know until you hear it coming from the witness stand -- you understand that -- but the

question is: In a proper case -- can you think of any case that would be proper in which you could consider the death penalty for a person who allegedly hired someone to kill someone else? In other words, you are just saying that automatically you wouldn't vote for the death penalty; you could consider it? That's what I'm trying to find out.

A: You ask some hard questions. Would you repeat that?

Q: Sure. The key question here as I see it is whether or not in a proper case -- and we don't know what it could be -- you could conjure up all kinds of horrendous things in your mind -- you need to do that while I'm asking you this questions -- but in a proper case, could you consider assessing the death penalty as a proper punishment if that was in fact an element of the punishment for a person who allegedly hired someone to kill someone else? In other words, you wouldn't just automatically vote no to the death penalty; you could in fact consider it in a proper case. Is that true?

A: Yes.

MR. HOUSE: I will object to the challenge.

MR. POE: May I have a moment?

THE COURT: Yes:

BY MR. POE:

(R.A. 1612; R.A. 1613)

Q: My question was: Could you be fair and you told me you couldn't really be fair to the State because of the way you feel. And apparently Mr. House talked to you a little different and a different aspect comes in. I'm just trying to ask you: Can you be totally fair to the State knowing that the Defendant didn't do the shooting?*** And I believe you told me that you couldn't really be fair starting out to the State; you have some type of bias, maybe, against that type of offense being capital murder; is that right? Is that right?

Is that what you told me?

MR. HOUSE: I object to the form. The question has to be captioned in terms of whether or not you could consider the death penalty.*** I don't agree with that statement. I think it's wheth or not he could consider it in a proper case.

THE COURT: I'm inclined to agree with you, Counsel. I think the issue here is whether you can comply with the 12.31.

MR. POE: The State has the right, as well as the Defense, to have 12 unbiased Jurors in any criminal case, whether it's a capital offense or misdemeanor.

THE COURT: Let me ask you one more question.

Mr. Schlosser, in a murder for hire case if you were selected as a Juror, you could not, under any cir-

cumstances, as I understand it, vote and inflict the death penalty for a person who hired someone else to commit murder regardless of what the facts are? You could not do it; is that what you are saying?

MR. SCHLOSSER: Well, he mentioned --

THE COURT: You answer my question.

MR. SCHLOSSER: I want to explain my answer.

THE COURT: We don't care -- it really doesn't matter why you feel. We want to know how you feel. Everybody is entitled to his own opinion. You don't have to justify it.

***Can you, if you were selected as a Juror, under any imaginable set of facts vote to inflict the death penalty on a person convicted of hiring someone else to commit murder? That's the question.

MR. SCHLOSSER: Not under any circumstances, no.

MR. POE: I renew my challenge.

THE COURT: I sustain the challenge.

MR. HOUSE: I object to the sustaining of the challenge.

(R.A. 1614-1616)

Defense Counsel, obviously skeptical that communication was occurring, continued, asking Schlosser whether he had understand the Judge's question. He explained that what is crucial is that "you wouldn't just automatically vote against the death penalty, could you in fact consider . . . assessing the death penalty if it was a proper case under the proper circumstances? Schlosser replied, certain conditions I could think of where I could and certain where I couldn't. (R.A. 1617; R.A. 1618). Defense Counsel at this point stressed to Schlosser the fact that,

"You don't know the facts of this case or any other case. But there are cases that you can imagine that you would definitely consider, as I understand it, assessing the death penalty to a person who allegedly hired someone to kill someone else? You would as to the person who allegedly hired him, consider the death penalty; is that right?

A: Yes.

Q: There are certain cases where that's true?

A: Yes.

MR. HOUSE: I think he qualifies.

(R.A. 1618; R.A. 1619)

MR. POE: Let me ask you some questions.*** It seems like each one of us get a different answer.*** Do you have some difficulty or problem with (the law that the person who does the hiring is subject to the death penalty)?

A: Yes. Like I told you at the start, I disagree with that.

***

Q: The fact that you feel that way means that you would carry that feeling through out the trial, wouldn't you?

A: Yes, sir.

Q: I hate to use the word bias.*** But you feel in your own mind that you wouldn't really put that feeling aside because we can't really put our feelings aside, that's impossible; is that right?

A: *** And if you are a Juror in this case would you be able to put that aside or not? If you can't, just tell the Court.

A: No, sir.

MR. POE: It will be a challenge for bias.

(R.A. 1619-1621)

MR. HOUSE: I need to ask you a couple more questions.*** Mr. Schlosser, you already indicated that there are certain cases in which you could consider the death penalty (as a proper punishment) for the person who allegedly hired . . . another person to kill a third party -- as a proper punishment?

A: Yes.

Q: Now, the question here is: Even though you have a bias, the question is: Can you follow the law? The Judge is going to give you the law and if that law is that ... the State is seeking the death penalty on a particular individual, the question is: Can you follow the law and consider the death penalty despite your bias, because we all have bias.

A: A bias -- I have been influenced by biases. The law is not always perfect.

(R.A. 1621; R.A. 1622)

***

A: I couldn't automatically veto.

Q: Could you consider it?

A: Yes.

(R.A. 1622; R.A. 1623)

Q: So your bias itself could be overcome in a proper case, is that what you are saying?

***

A: I couldn't answer yes or no, on that becuase you are always influenced one way or another.

(R.A. 1623)

Q: But the questions is, Mr. Schlosser, could you follow the law and in a proper case consider the death penalty despite your bias. That's the real question.

A: Yes, I could.

MR. HOUSE: I object to the challenge.

(R.A. 1624)

Q: Do you disagree with the law, is that correct?

A: Yes.

Q: Can you answer out?

A: Yes:

Q: And you have a strong feeling that it would affect your deliberations in this case; is that right?

A: Right, my bias.

Q: We call it bias. I hate to use that term. But let's call it that because we know what we're talking about. *** (If you had to make the decision whether it was a death penalty or life imprisonment, the way you feel would really affect your deliberations, wouldn't it?

A: Yes, sir:

Q: We are not talking about . . . whether or not you could follow the law because you would be a Juror and you would be sworn to follow the law. I'm talking about your bias affecting your deliberations. It would affect you, wouldn't it?

A: Yes:

MR. POE: Thank you. It will be a challenge.

(R.A. 1624-1626)

At this juncture, the trial judge was shown an opinion (Hovila) in question; thereafter he stated, "All right. The Court will sustain the challenge. You will be excused Mr. Schlosser."

But the Defense Counsel objected to the court's ruling and requested to question the venireman further. The trial court told him to go ahead. Counsel elicited reaffirmations from Schlosser that he did believe in the law of capital punishment, that he personally disagreed with the law in the respect previously discussed, and then asked,

Q: But the question is: Despite your bias or your disagreement with that law, could you follow the law?

MR. POE: I object to that. That is not an issue.

THE COURT: Sustained.

(R.A. 1627)

Defense counsel then requested an opportunity to make a bill of exceptions.

The pertinent parts of Mr. Ellis's voir dire examination are set forth as follows: The Court:

"So what we are getting down to is whether or not you have any conscientious or religious or moral scruples against the assessment of death in a case if you thought it were proper?

MR. ELLIS: Do I have to say yes or no?

THE COURT: Go ahead and explain your feelings.

MR. ELLIS: I would say if the evidence is factual enough and true enough I would probably go along with it.

THE COURT: The only thing I'm going to quarrel with you about is when you say probably. In other words, if I understand you right, you are saying that your best judgment, which is all you can give us, but your deep hard feeling about the matter is: If you found the man guilty beyond a reasonable doubt, which is what the burden of proof is, then you could, if the facts were bad enough, assess death?

MR. ELLIS: Yes.

THE COURT: All right, sir. Mr. Poe."

(R.A. 3898; R.A. 3899)

BY MR. POE:

Q: *** What are your personal feelings about the infliction of the death penalty in a proper case on the person that hires another to kill somebody?

A: As I said before, if it was proved beyond a reasonable doubt, I would feel he is as guilty as the person that did the actual killing.

Q: *** You think this is proper, if the man is truly guilty of that offense, then he should get the death penalty if it's a proper case, is that right?

A: Yes.

A: Yes.

Q: It might call for the death penalty. It might be a proper case for the death penalty?

A: Yes.

Q: So what I'm asking is -- not you would do it-- but would you consider it? I know it's a difficult question. Could you consider it?

A: May I say again that I feel that he is as guilty as the man who did the actual killing? He is contemplating or scheming this crime is a very vicious person.

(R.A. 3917; R.A. 3818; R.A. 3919)

Q: (By Mr. McLean) See, it's not your fault that you didn't get to sit in judgment of this man, because the State has taken that opinion away from you. And they are saying: We are going to let him plead guilty to something less so we can use him against this man who we think is much worse.

A: The way you put it there, I fell that he should be given death but he hasn't been proven guilty.

Q: Right. But you could consider the death penalty, couldn't you?

A: In a case lilke that, I guess I could."

(R.A. 3922)

Q: (By Mr. Poe) It's the only alternative, life or death. And you can consider in a proper case -- would it affect your deliberations, Mr. Ellis? You know yourself and your conscience better than I do.

A: I know my conscience is I would definitely deliberate death against life and I would be inclined to go with life.

(R.A. 3924)

Q: Now, after hearing the case on this, all of the evidence, considering that this won't be all of the evidence, what he says -- it might not be all the evidence -- will not be all the evidence -- there could be more and probably will be against this man. And you knowing that he is not going to be subject to the death penalty, after you have heard all the evidence on this man, heard what this man has testified about and you believe it and there was some other evidence tending to connect this man to the crime, Mr. Poe is asking you: When you went back in the jury room to say death or life to this man, would the mere fact that he wasn't subject to the death penalty make you automatically turn away and give this man life just like that?

A: It would affect my deliberations, yes.

Q: Would it affect it to the point where you would automatically turn and give him life, or are you saying that you would be concerned about it because you are dealing with a human life?

A: That's right.

Q: You would be concerned about it?

A: That's right.

Q: Like all of us would be.

If Mr. Poe or anybody, if we were sitting on the jury, we would be concerned about whether our vote would say death or our vote would say life. Anybody would be concerned about that, right?

A: Yes.

Q: But would you be concerned about it so much that you would not take into consideration all of the facts and circumstances against this man right here that instigated this whole affair and say, well, no, I'm going to give him life?

Would you do that or would you consider voting yes? It's rough. I'm probably not making it very clear.

A: What I am trying to say is I don't believe that I'm that man's judge to say death, where I would be possibly his judge to say that he's deserving of life considering the fact that the other man is going to receive something less than death.

THE COURT: You would automatically turn from death consideration to life?

MR. ELLIS: Yes.

THE COURT: It would affect your factual deliberations?

MR. ELLIS: Yes.

MR. POE: I renew my challenge.

THE COURT: I sustain the challenge.

MR. MCLEAN: I object to the sustaining of the challenge.

(R.A. 3926; R.A. 3927; R.A. 3928)

The pertinent facts are shown hereinbelow by the voir dire examination of prospective juror MERDIAN as follows:

The trial judge explained certain legal principals involved in the instant case to prospective juror D.C. Merdian (R.A. 3182-3186) but the following also occured:

"THE COURT: And, likewise, you feel that this would, knowing what the death penalty amd the punishment involved would be, you feel that it must affect your deliberations as to any fact issue in the case?

MR. MERDIAN: No, it wouldn't do that."

(R.A. 3186) Thus, upon voir dire examination by the attorneys the following ocurred:

> BY MR. SHULTS: (with reference to the Special Issues of Art. 37.01(b)(1) and (2), V.A.C.C.P.)
>
> "You might be convinced beyond a reasonable doubt, which is the State's burden of proof, that the answer to both of those questions, based on the factual determination that you are called upon to make, should be yes.
>
> But, because, number one, the fact that you know the result of your answer and, number two, your opposition to a sentence of death, you know, would that opposition or that conscientious scruple that you might have against the death penalty cause you to go against what you feel to be the proper factual determination and answer the question no simply to avoid the death penalty?
>
> A: No. I would answer it yes. I would tell the truth, in other words.
>
> Q: So, even knowing the effect of your answers, that if you answered both of them yes, you could swear under your oath as a juror that you would answer them yes knowing that would mean he would receive the death penalty?
>
> A: Yes.

(R.A. 3191; R.A. 3192) (Emphasis supplied).

> BY MR. SHULTS:
>
> Q: *** Even though you have strong conscientious objections to the assessment of the death penalty, if you were convinced that the State had proved to you beyond a reasonable doubt that the answer to both of those questions should be yes, you would set aside your conscientious scruples and answer the questions yes knowing that it would result in the death penalty?
>
> A: Yes, sir."

(R.A. 3192; R.A. 3193)

Mr. Shults then asked Mr. Merdian how Mr. Merdian could resolve in Mr. Merdian's mind the apparent conflict of not being able to assess death directly but apparently being able to truthfully answer factual determinations that would result in death. Mr. Merdian responded thusly.

> A: Well, maybe two wrongs don't make a right kind of principle. In other words, I have to follow my conscience as far as answering the question yes or no is concerned.
>
> If you have been put on the jury just by what I've said, I would feel that the law must allow a person with those viewpoints to be there

and, therefore, I could continue to judge each question as I see it when it comes. And then I suppose subconsciously it puts the guilt, or whatever, of the decision-making out of my hands, kind of.

Q: So when it comes to answering the questions, there is no doubt in your mind, and you could take an oath, that your conscientious feelings about the when it comes to answering those two factual determinations?

A: That's right.

(R.A. 3193; R.A. 3194) (Emphasis supplied).

The continuation of voir dire by Mr. Shults as to the type of case Mr. Merdian would consider proper for the death penalty revealed the following:

"Q: How then, we have talked about your feelings about the death penalty in general, the fact that you would be able to get aside in a proper case and answer the questions yes or no.

Is there anything about the fact that capital murder or that the death penalty is provided as a possible punishment for a murder for hire, is there anything about that that changes your mind?

In other words, is there anything about a murder for hire where you say you could never consider the death penalty for that particular offense?

A: There is nothing different about it as far as I'm concerned.

Q: So you think that if anything is proper for the death penalty, that offense is?

A: Yes, sir."

(R.A. 3199) (Emphasis supplied).

Mr. McLean questioned this prospective juror after Mr. Shults challenged for cause (R.A. 3220) as to whether or not he could make a determination based on two evidence and special answer issue No. 2 either yes or no. (R.A. 3224, 3225) and Mr. Merdian said specifically yes that he could. (R.A. 3225). Mr. Merdian responded to questions by Mr. Shults that knowing a person would get the death penalty would affect his deliberations on a factual issue but that he could, in a proper case, answer special issue No. 2 yes (R.A. 3227). The Court sustained the State's challenge for cause and Petitioner objected (R.A. 3228). The following then occurred:

BY MR. HOUSE:

Q: My name is Bennie House. The question to you is if the State proved up as to Question No. 2 their burden of proof beyond a reasonable doubt that it was probable that the Defendant would commit future acts of violence that would be a continuing threat to society, could you then answer that question because they proved it up beyond a reasonable doubt? Could you answer that question yes?

A: I can't swear I would.

Q: Can you swear that you would not answer it yes?

A: No, I can't do that either.

Q: Would you automatically --

A: I can swear that I believe in many cases it would affect my answer.

MR. SHULTS: We reurge our challenge.

THE COURT: I sustain the challenge.

MR. HOUSE: I object to the challenge, sir.

(R.A. 3229) (Emphasis supplied).

The pertinent facts are shown hereinbelow by the voir dire examination of the prospective juror Rein as follows:

"THE COURT: Did you understand fully the explanation I gave you about the only two possible penalties, if you find the person is guilty of capital murder, is either mandatory life or death?

MR. REM: Yes.

THE COURT: Do you feel that your feelings on the matter are such that this would interfere with your factual determination of any issue?

MR. REM: Well, not really -- but I think it would.

THE COURT: Do you have some question in your mind?

MR. REM: Well, I never did this before. I'm just kind of scared, you know.

THE COURT: I will allow either side to question. Go ahead."

(R.A. 1100; R.A. 1101).

Q: Now let me first ask you this question, if I could sir. Knowing that death is a possible punishment and this Jury may well have to make that decision as to whether or not this man is sentenced to a prison term of life sentenced to a prison have any conscientious, religious, or

moral scruples against the infliction of death for punishment for the crime in a proper case?

A: Well, in a way, you know -- I was saying, I'm kind of nervous and stiff like that. But it would have little effect on me knowing that I was doing this, you know, knowing what I have done on any case, that I was trying part of it and justified within me that I was, you know, in it.

(R.A. 1103).

Q: You yourself have this position of being opposed to the death penalty as far as you yourself participating in it?

(R.A. 1104).

BY MR. MCLEAN:

Q: Can you think of any fact situation where you could deal out the death penalty?

A: Well, unless someone killed my mother or something happened to my family relationship. But aside from that, you know, no. That's the only way.

Q: Would you follow the law that the Court gives you?

A: Yes.

Are you saying that you would automatically vote no on the question of death no matter what the facts showed?

A: Well, I couldn't way. No -- I mean, like -- well, not really. It's just that I really wouldn't want to be answering. I have a closed mind. I would vote, you know.

(R.A. 1107; R.A. 1108).

Q: But are you telling the Court and are you telling us that you would automatically vote no to death or you would automatically vote against the death penalty no matter what occurred at the trial, no matter what the facts were?

A: Well, I couldn't say.

Q: You can't say that?

(R.A. 1108).

Q: So there is a particular fact situation where you could vote for the death penalty based upon the facts on a proper case. That's what we are talking about, is a proper case.

A: Well, I don't know.

Q: But you wouldn't automatically vote no as a matter of course?

A: Well, like, I probably wouldn't -- I don't know. It's just, you know --

Q: Would the fact that the mandatory punishment be death or life, would that affect you on any issue of fact that you had to decide?

A: No, not really it wouldn't. But in a way, like I was telling you, you know, I don't like doing this. It has an affect on me. It would have an affect on me. I wouldn't be able to do this.

(R.A. 1108; R.A. 1109).

Q: Supposing we got to a Punishment Hearing -- because this is a two-stage trial, either guilty or not guilty -- and if guilty, then we have a second part of the trial where you would listen to evidence presented by one or both sides and make a determination of whether the punishment would be death or life, do you understand that?

A: Yes.

Q: Now, would the fact that you might have to possibly deal out the death penalty hamper your issued on fact on guilt or innocence? In other words, knowing that you might have to find someone guilty and then deal the death sentence or life, would that affect you on guilt or innocence? Could you determine the facts as to whether a man were guilty or guilty fairly?

A: In a way I could. In a way, but not further than that.

Q: Knowing if you had to give someone death or life, would that automatically make you say not guilty?

A: No.

(R.A. 1109; R.A. 1110).

Q: So then you are saying that you wouldn't automatically be against the death penalty in a given case?

A: Well, like I've said, if justice -- if it was wrong, it's wrong. If it's right, it's right. But, like, I ain't never did this. I don't know how I would feel by doing this. Like, I would, you know, be kind of --

Q: I know it's a heavy burden. Are you telling us that you would listen to the evidence and determine the fact issues fairly?

A: Well, I would do that -- when it comes time to vote I don't know what I would do.

Q: You don't know what I would do.

A: Right.

Q: If you thought beyond a reasonable doubt that someone should get the death penalty based upon the facts, could you inflict it?

A: It's kind of hard to say.

Q: It's hard to say?

A: Yes.

Q: But you are not saying that you couldn't, are you?

A: Well, I'm saying, you know, I don't like to do this. I wouldn't like to do this.

Q: If the facts were so horrible could you inflict the death penalty?

A: If the facts were so horrible could I inflict--

Q: Could you vote in favor of the death penalty?

A: Well, I don't know.

Q: You don't know?

A: Well, in a way I could. You know, like dealing with someone close to me. I would have to deal with it a long time and get all the evidence and stuff, you know.

(R.A. 1110; R.A. 1111).

Q: You are not saying that you could not inflict the death penalty, are you?

A: No.

Q: You don't know?

A: No.

(R.A. 1112).

THE COURT: Mr. Rein, I believe we have gotten two different impressions of what you are saying here. I'm not sure you understand fully what we are talking about. We are not arguing with you. We just want however you honestly feel. We are not trying anybody regarding your family. We are talking about things regarding the subject of capital murder. And you said you understood that the mandatory penalty was life or death. Knowing that it's life or death, can you state under oath that that would not affect your deliberations on the factual questions involved?

MR. REM: It will.

THE COURT: It will affect your deliberations?

MR. REM: Yes.

THE COURT: I will sustain the challenge. You may be excused.

(R.A. 1112; R.A. 1113).

"MR. MCLEAN: Before we bring out the next juror, I would like to inquire as to whether or not the Court sustained the State's challenge for cause as to 12.21(b)?

THE COURT: On the basis of his answer to 12.31(b) it was apparent that he wasn't qualified.

(R.A. 1113)

APPENDIX "B"

J., held that: (1) trial court did not err in submitting issue of whether State's witness was accomplice witness as question of fact for jury; (2) evidence was sufficient to corroborate accomplice's testimony; (3) indictment sufficiently alleged facts to enable defendant to prepare his defense and was not subject to motion to quash; (4) trial court did not err in overruling defendant's objection to testimony of police officer that officer observed no remorse on part of defendant; (5) court did not err in failing to submit "accomplice witness" charge at punishment stage of trial; (6) evidence was sufficient to support jury determination that defendant's conduct was deliberate and defendant would commit criminal acts of violence that would constitute continuing threat to society; (7) evidence was sufficient to support trial judge's decision that defendant's wife voluntarily consented to search of premises; (8) defendant was not denied his rights to fair and impartial trial and due process on theory State presented false testimony at guilt stage of trial on issues of witness' complicity and remuneration; and (9) defendant's statement to inmate was properly admitted in evidence over defendant's objection.

Judgment affirmed.

Roberts, J., dissented and filed opinion.

Clinton, J., dissented and filed opinion in which Teague, J., joined.

Robert Allan MAY, Appellant,

v.

The STATE of Texas, Appellee.

No. 66248.

Court of Criminal Appeals of Texas, En Banc.

May 20, 1981.

Rehearing Denied July 15, 1981.

Defendant was convicted after jury trial in the 228th Judicial District Court, Harris County, Allen Stilley, J., of capital murder and sentenced to death, and he appealed. The Court of Criminal Appeals, Dally,

1. Criminal Law ⇐511.2

Conviction cannot be had upon testimony of accomplice witness unless that testimony is corroborated by other evidence tending to connect defendant with offenses committed, and corroboration is not sufficient if it merely shows commission of offense. Vernon's Ann.C.C.P. art. 38.14.

2. Criminal Law ⇐780(1)

Where there is doubt whether witness is accomplice, submitting issue to jury is sufficient even though evidence preponderates in favor of conclusion that witness is accomplice as matter of law.

3. Criminal Law ⇐507(1)

Witness is not deemed accomplice witness because he knew of crime but failed to disclose or even concealed it.

4. Criminal Law ⇐507(1)

Mere presence at scene of offense does not compel conclusion that witness is an accomplice witness.

5. Criminal Law ⇐507(1)

One is not accomplice witness who could not be prosecuted for offense for which accused is charged.

6. Criminal Law ⇐507(1)

Witness' complicity with accused in commission of another offense does not make his testimony that of accomplice for offense for which accused is on trial.

7. Criminal Law ⇐742(2)

Where witness admitted that he knew of scheme to kill deceased and that he was present at scene of offense carrying pistol delivered to him by defendant, but there was no evidence that witness was ever charged with offense or that he was party to any agreement between defendant and person hired to kill deceased, trial court did not err in submitting issue of whether witness was accomplice witness as question of fact for jury.

8. Criminal Law ⇐511.2

To test sufficiency of corroboration of accomplice witness, one must eliminate from consideration evidence of accomplice witness, and then examine evidence of other witnesses to ascertain if it is of incriminating character which tends to connect defendant with commission of offense; if there is such evidence, corroboration is sufficient, otherwise, it is not.

9. Criminal Law ⇐511.1(1)

Testimony corroborative of accomplice witness need not directly link accused to crime or be sufficient in itself to establish guilt but rather corroboration need only make accomplice's testimony more likely than not.

10. Criminal Law ⇐511.7

Evidence in defendant's prosecution for capital murder, including testimony of State's witness that defendant had told such witness on at least three occasions prior to date of killing, that defendant wanted man on certain street killed and that defendant had hired accomplice witness to do killing, was incriminating, tended to connect defendant to commission of offense, and made accomplice testimony more likely than not; thus, evidence was sufficient to corroborate accomplice witness' testimony.

11. Indictment and Information ⇐65, 71.2(1), 110(3)

Indictment must allege facts sufficient to give defendant notice of precisely what he is charged with, however, unless fact is essential for notice to defendant, indictment need not plead evidence relied on by State and it is rare exception when indictment drawn in language of penal statute is legally insufficient to provide defendant with notice of charged offense. Vernon's Ann.C.C.P. art. 21.11.

12. Indictment and Information ⇐71.4(5)

Where indictment contained all of constituent elements of offense under provisions of statute governing penal murder defining murder for remuneration, additional information requested by defendant pertaining to specificity of remuneration was evidentiary and not required for purposes of notice and plea in bar; therefore, indictments sufficiently alleged facts to enable defendant to prepare his defense and was not subject to motion to quash. V.T.C.A., Penal Code §§ 19.02, 19.03, 19.03(a)(3).

13. Criminal Law ⇐451(3)

Where officer who had conversation with defendant three days after shooting of deceased stated that defendant did not appear to be emotionally upset and was neither crying nor weeping, additional statement by officer "that there was no remorse that he evidenced," was not incompetent testimony as conclusion on part of officer, but was merely shorthand rendition of facts occurring on that visit.

14. Criminal Law ⇐1208(1)

Relevant information about defendant as used in procedure in capital cases includes admitting evidence of his prior criminal conduct whether or not such conduct resulted in final conviction. Vernon's Ann. C.C.P. art. 38.14.

15. Criminal Law ⇐1208(1)

Uncorroborated accomplice witness testimony falling within range of prior criminal conduct would be relevant information about defendant, and nothing in article governing procedure in capital cases precludes it from supporting affirmative answer to either of first two special issues under such statute. Vernon's Ann.C.C.P. art. 37.071.

16. Criminal Law ⇐780(1)

Evidence offered to prove special issues of statute governing procedure in capital cases is not included within provisions of article governing testimony of accomplice; thus, jury's "yes" answers to special issues of article governing procedure in capital cases were supportable on relevant accomplice witness' testimony concerning defendant's prior criminal conduct and court did not err in failing to submit "accomplice witness" charge at punishment stage of defendant's trial for capital murder. Vernon's Ann.C.C.P. arts. 37.071, 38.14.

17. Homicide ⇐354

Evidence in punishment stage of defendant's trial for capital murder, including testimony of witnesses that defendant had hired them to kill another man prior to accomplice's killing decedent, and testimony of accomplice that defendant had discussed with accomplice killing of merchant seaman and killing of unknown man whose wife wanted him murdered, sufficiently supported jury's determination that defendant's conduct was deliberate and defendant would commit criminal acts of violence that would constitute continuing threat to society. Vernon's Ann.C.C.P. art. 37.071.

18. Criminal Law ⇐1171.1(2)

Argument will not constitute reversible error unless, in light of record as whole, argument is extreme or manifestly improper, violative of mandatory statute or injects new facts, harmful to accused into trial proceedings.

19. Criminal Law ⇐1171.1(5)

If prosecutor's remarks during jury argument may be reasonably construed as referring to defendant's failure to present evidence through witness other than himself, reversal is not required.

20. Criminal Law ⇐730(11)

Where as result of court's overruling, defendant's first objection to prosecutor's closing argument, prosecutor merely commented on defendant's failure to present evidence through a witness, sustaining of defendant's second objection followed by instruction to jury to disregard prosecutor's argument sufficiently cured alleged defect that argument gave inference that there was some inadmissible testimony jury should have heard, and record as whole revealed overwhelming guilt of defendant, prosecutor's argument if construed to refer to inadmissible testimony did not constitute reversible error.

21. Searches and Seizures ⇐7(28)

Evidence at hearing on motion to suppress of defendant charged with homicide, including testimony of defendant's wife that police officers had been polite to her, did not threaten her to obtain her consent for search, and that she was not under any intoxicant at time she consented to search, supported trial judge's decision that defendant's wife voluntarily consented to search of premises.

22. Searches and Seizures ⇐7(27)

Search conducted pursuant to consent is one of specific established exceptions to Fourth Amendment requirement of both warrant and probable cause. U.S.C.A. Const. Amends. 4, 14.

23. Searches and Seizures ⇐7(27)

Extent of consent to search is limited by consent obtained in particular instance.

24. Searches and Seizures ⇐7(27)

Where written consent to search form given by defendant's wife authorized police

officers to conduct complete search of defendant's home and seize any letters, papers, materials or other property they desired, consent to search was not invalid on theory it allowed State to circumvent warrant requirement as it was used to conduct general exploratory search.

25. Criminal Law ⇐1169.1(1)

Where written statement of accomplice witness was never readmitted in evidence for jury's consideration for any purpose, and jury never saw any contents of statement, any error of trial court in admitting in evidence such statement was harmless error.

26. Criminal Law ⇐422(6)

Where there is sufficient independent evidence to establish conspiracy, hearsay acts and statements of conspirator which are made prior to time object of conspiracy is completed are admissible, and they are admissible even though occurring out of presence and hearing of conspirator on trial.

27. Criminal Law ⇐423(9)

Where conspiracy between defendant and accomplice did not terminate upon completion of murder, but rather it was contemplated by conspirators that accomplice would receive compensation for killing of victim, and on night accomplice made statement to another State's witness that implicated defendant in murder, accomplice had not yet received all compensation agreed upon, object of conspiracy had not been completed; thus statement made by accomplice to State's witness was not inadmissible on theory it was made after conspiracy had ended.

28. Constitutional Law ⇐268(9)

Where State merely presented more detailed recitation of witness' complicity at punishment stage of trial so that attention could be focused on alleged extraneous offenses, and at guilt stage of trial, it may have been improper reference to extraneous offense if State had been permitted to prove that defendant had also hired such witness to kill decedent in addition to hiring person who had actually done killing, defendant was not denied his right to fair and impartial trial and due process of law on theory that State presented false evidence on issues of whether such witness was accomplice as matter of law at guilt stage of trial.

29. Constitutional Law ⇐268(9)

Where at guilt stage of trial, it may have been improper reference to extraneous offense if State had been permitted to prove that car was actually bought by defendant to serve as remuneration for killing of one other than decedent, accomplice's testimony at guilt stage of trial merely established that car was purchased by a defendant for a job that he was to do for defendant, and that defendant asked accomplice to kill deceased and car was then used as partial remuneration for offense, defendant was not denied his rights to fair and impartial trial and due process of law on theory State presented false evidence on issue of remuneration at guilt stage of trial.

30. Homicide ⇐354

Although at punishment stage of trial, accomplice testified that car was originally purchased to serve as partial remuneration for killing of one other than deceased, but did not testify that car was in fact remuneration for that offense, where at guilt stage of trial, accomplice testified that he received car as partial remuneration for instant offense and such testimony was corroborated by other circumstances, State sufficiently disproved that car was remuneration for another offense and sufficiently proved that car was partial remuneration for instant offense.

31. Criminal Law ⇐412.1(2)

Where statement from defendant to another inmate was not product of "custodial interrogation," and there was no evidence that inmate was ever acting as agent of law enforcement official in his conversation with defendant, defendant's statement to inmate that inmate would receive free legal assistance if inmate would perjure himself at trial and testify that defendant's accomplice had told him that accomplice

killed deceased in course of robbery was properly admitted in evidence over defendant's objection. Vernon's Ann.C.C.P. art. 38.22.

32. Criminal Law ⇐1035(6)

Where defendant never raised objection to exclusion of prospective juror, defendant waived such error on appeal.

33. Criminal Law ⇐1043(3)

Where no specific objections were made by defendant to State's challenge for cause that any prospective jurors' exclusions were inconsistent with United States Supreme Court holding which constituted limitation of State's power to exclude prospective jurors because of their views about capital punishment, but rather, defendant's objections were directed to disqualification of jurors under section of Penal Code governing capital felonies, defendant's failure to specify his objections that jurors' exclusions were inconsistent with Supreme Court holding waived such error on appeal. V.T.C.A., Penal Code § 12.31(b).

Ken J. McLean, W. B. "Bennie" House, Jr., Houston, for appellant.

John B. Holmes, Jr., Dist. Atty., Susan W. Crump, and Ted Poe, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

DALLY, Judge.

This is an appeal from a conviction for capital murder. The punishment is death.

The appellant asserts twenty-nine grounds of error. Since he complains that the evidence is insufficient to corroborate accomplice witness testimony, a detailed recitation of the facts is necessary.

Appellant was indicted for the murder of his stepfather, Roy Melton Ayotte. It was alleged that the appellant, for remuneration and the promise of remuneration, hired Arthur Smith to kill Ayotte. Ayotte had been shot once; his body was found outside the Acme Refrigeration Company located at 3111 Polk Street in Houston.

Arthur Smith, who admitted he shot the deceased, pled guilty to murder and testified as a State's witness in return for the State's promise not to seek the death penalty against him. The appellant did not testify.

Smith, a part-time employee at a service station owned by Troy Pardue, testified as follows concerning the events preceding the commission of the offense: He became acquainted with appellant in 1976 and in late September or early October, 1977, appellant approached him about killing the deceased and told him that upon the death of the deceased, the Acme Refrigeration Company, a business then owned and operated by the deceased, would pass to appellant's mother who in turn would allow appellant to operate the business. In return for the killing, appellant promised him payments of $1,000 and a 1968 Oldsmobile immediately after the killing and approximately $4,000 and a job within the following three year period. In preparation for the killing, he and appellant discussed various ways to kill the deceased and various alibis he could use. On four different occasions, he and appellant went to the Hot Wells Shooting Range to practice shooting appellant's .30-.30 Winchester rifle; the same rifle he used to shoot the deceased. While at the shooting range on one of these occasions in late October, 1977, he remembered seeing two police officers target practicing and he also remembered that appellant purchased a new box of ammunition for the rifle. In early November, 1977, appellant delivered a .38 caliber pistol to him, assisted him in placing a lawnmower muffler on the barrel, and instructed him to use it to kill the deceased on Saturday, November 12, 1977. He decided, however, to make no attempt to kill the deceased on either that Saturday or the following Saturday, November 19. Then on November 26, he attempted to kill the deceased, but the shot he fired with the pistol missed. The following week appellant delivered his .30-.30 Winchester rifle to

him in exchange for the pistol and instructed him to kill the deceased on December 3, 1977. Appellant told him to park on Polk Street across from the Acme Refrigeration Company and shoot the deceased with the rifle before the deceased entered the building.

Smith further testified as follows concerning the events surrounding the commission of the offense: He left work on the morning of December 3, 1977, armed with appellant's rifle. He drove appellant's blue Dodge automobile and parked on Polk Street across from the Acme Refrigeration Company. While waiting for the deceased, he observed William Miller and a man named Wayne driving around in the area and he then recalled that Miller had been present on a number of occasions when he had discussed killing the deceased with appellant. When the deceased arrived around 9:30 a. m., he shot the deceased one time with the rifle. At approximately this same time, he observed Miller and Wayne drive away from the scene. He then left the murder scene, placed the rifle in the trunk of the blue Dodge and returned to work that afternoon. Subsequently, he hid the rifle in the garage attic of Pardue's home. Appellant came by Pardue's service station later that day as did Miller and Wayne. He did not discuss the payment with appellant at that time. He did, however, discuss the killing with Miller and he told Miller that he was waiting for appellant to pay him for the killing. That evening he and Pardue went to Pardue's home and while he was there appellant called him on the phone and later came by to get him. He, appellant, and a woman named Vera then went to get the 1968 Oldsmobile before going over to appellant's home where he then received from appellant $150 in cash, papers to the car, and a promise that an additional $350 would be left for him in an envelope at Pardue's service station. After arguing with appellant about a change in the payment terms, he left to visit his estranged wife, Rhonda Stovall. He told Stovall about the killing of the deceased and appellant's involvement in the killing. He left her some of the $150 he was paid by appellant and he then drove to his sister's home in Louisiana. The following day, however, he returned to Houston for the purposes of collecting the $350 from the appellant and revisiting Stovall. He was unsuccessful in his attempt to collect the money from appellant, but he did revisit Stovall. He then returned to Louisiana where he was subsequently arrested for this murder. At the time of his arrest, he was driving the 1968 Oldsmobile given to him by appellant on the day of the murder.

[1] The trial court properly instructed the jury that Smith was an accomplice witness as a matter of law. A conviction cannot be had upon the testimony of an accomplice witness unless that testimony is corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense. Art. 38.14, V.A.C.C.P.

Troy Pardue testified that Smith left work at approximately 9:00 a. m. on December 3, 1977, Smith did not return to work until the afternoon of the same day, and appellant also came by his station the same afternoon. He and Smith left work around 7:00 p. m. and went over to his home. Shortly thereafter, appellant called on the phone and asked to speak with Smith. Approximately thirty minutes after the phone call, he heard a car horn outside and Smith left. He did not, however, observe the occupants of the car.

Rhonda Stovall, Smith's estranged wife, testified that as early as November, 1977, Smith had mentioned killing a man for appellant. She also testified that Smith visited her around 10:00 p. m. on the night of December 3, 1977, and told her about the killing of the deceased and appellant's involvement in the killing. He left her some money which he told her was part of the payment he received from appellant for killing the deceased. The following evening, he again visited her.

Stovall further testified that based on what Smith had told her about the killing, she contacted Houston police officers by

phone on two different occasions. In the first phone call, she told police officers that she thought the rifle Smith used could be found in the trunk of a blue car which was parked at Pardue's service station. In the second phone call, she told police officers that she subsequently learned the rifle Smith used in the killing could be found in Pardue's garage attic.

R. L. Deloney, an officer of the Houston Police Department, testified that he received two phone calls after the killing of the deceased and that the caller identified herself as Rhonda Stovall on the second phone call. Based on Stovall's information, police officers recovered a spent .30 caliber cartridge on a desk at Pardue's service station and a .30–.30 Winchester rifle in Pardue's garage attic. These items were admitted in evidence.

G. E. Thyssen and J. E. Wiggens, officers of the Houston Police Department, testified that they observed appellant with Smith at the Hot Wells Shooting Range in late October, 1977, and that he was carrying a .30–.30 Winchester rifle; the same type of rifle as the one admitted in evidence. They also observed appellant coming out of the office of the Hot Wells Shooting Range carrying a new box of ammunition.

Larry Hoffmaster, an officer of the Houston Police Department, testified that he and other officers conducted a search of appellant's home and discovered a box of ammunition containing .30 caliber cartridges. The box was minus six cartridges. Dallas Lamar, the secretary/manager of the Hot Wells Shooting Range, testified that the handwritten price marking on the box of ammunition recovered from appellant's home appeared to be the handwritten price marking that she placed on boxes of ammunition from her shooting range. Officer Hoffmaster further testified that he recovered the fatal bullet at the murder scene. Although the bullet was badly damaged, Robert Warkentin, a chemist, testified that it was a .30 caliber bullet.

William Miller was called by the State as a rebuttal witness. Appellant argues that Miller's testimony may not be considered in corroboration of Smith because Miller was an accomplice witness as a matter of law. See *Caraway v. State*, 550 S.W.2d 699 (Tex.Cr.App.1977); *Chapman v. State*, 470 S.W.2d 656 (Tex.Cr.App.1971).

Miller testified that appellant told him on at least three occasions prior to December 3, 1977, that he (appellant) wanted a man on Polk Street killed and that he (appellant) had hired Smith to do the killing. He further testified that Smith was present on at least two of these occasions and that Smith had also told him that he (Smith) had been hired by appellant to kill a man on Polk Street. On the evening of December 2, 1977, appellant delivered to him a .38 caliber pistol with a lawnmower muffler attached. The following morning, he and Wayne Spring drove to Polk Street to wait for a man; Miller was carrying the .38 caliber pistol with him at this time. He saw the man he was waiting for shot, but he did not see who fired the shot. He and Spring then drove to Pardue's service station where he told appellant about the killing. Appellant said he knew of the killing but stated that he did not wish to discuss any of the details at that time. Miller subsequently talked with Smith and Smith told him that he had just killed a man and that he was waiting to be paid by appellant for the killing.

Miller was asked if he could identify the rifle offered in evidence by the State. He testified that it was the same rifle appellant had delivered to him about a month prior to the killing and the same rifle appellant had then obtained from him about a week prior to the killing of the deceased.

[2–7] The record reflects that the appellant withdrew his request for the court to instruct the jury that Miller was an accomplice witness and he objected to the court submitting such an instruction. However, the court submitted the issue of whether Miller was an accomplice witness as a fact question for the jury to decide. Where there is doubt whether a witness is an accomplice, submitting the issue to the jury is sufficient even though the evidence preponderates in favor of the conclusion that the

witness is an accomplice as a matter of law. *Carrillo v. State*, 591 S.W.2d 876 (Tex.Cr. App.1979); *Colunga v. State*, 527 S.W.2d 285 (Tex.Cr.App.1975); *Ward v. State*, 520 S.W.2d 395 (Tex.Cr.App.1975). Miller admitted that he knew of the scheme to kill the deceased and that he was present at the scene of the offense carrying a pistol delivered to him by appellant. There is no evidence that Miller was ever charged with this offense or that he was a party to any agreement between appellant and Smith. A witness is not deemed an accomplice witness because he knew of the crime but failed to disclose or even concealed it. *Carrillo v. State*, supra; *Easter v. State*, 536 S.W.2d 223 (Tex.Cr.App.1976); *Gausman v. State*, 478 S.W.2d 458 (Tex.Cr.App.1972). Mere presence at the scene of the offense does not compel the conclusion that the witness is an accomplice witness. *Arney v. State*, 580 S.W.2d 836 (Tex.Cr.App.1979); *Villarreal v. State*, 576 S.W.2d 51 (Tex.Cr. App.1978). One is not an accomplice witness who cannot be prosecuted for the offense for which the accused is charged. *Carrillo v. State*, supra; *Villarreal v. State*, supra; *Easter v. State*, supra. A witness' complicity with the accused in the commission of another offense does not make his testimony that of an accomplice to the offense for which the accused is on trial. *Carrillo v. State*, supra; *Caraway v. State*, supra; *Easter v. State*, supra. We hold that the trial court did not err in submitting the issue of whether Miller was an accomplice witness as a fact question for the jury. See and compare *Carrillo v. State*, supra; *Ward v. State*, 520 S.W.2d 395 (Tex.Cr.App.1975); *Zitterich v. State*, 502 S.W.2d 144 (Tex.Cr.App.1973).

[8, 9] In view of the court's instruction and the jury's verdict, we may consider the testimony of Miller in corroboration of the testimony of the accomplice witness Smith. To test the sufficiency of the corroboration of an accomplice witness, one must eliminate from consideration the evidence of the accomplice witness, and then examine the evidence of the other witnesses to ascertain if it is of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise, it is not. *Carrillo v. State*, supra; *Brown v. State*, 561 S.W.2d 484 (Tex. Cr.App.1978); *Caraway v. State*, supra; *Etheredge v. State*, 542 S.W.2d 148 (Tex.Cr. App.1976); *Reynolds v. State*, 489 S.W.2d 866 (Tex.Cr.App.1972). The corroborative testimony need not directly link the accused to the crime or be sufficient in itself to establish guilt. *Lyman v. State*, 540 S.W.2d 711 (Tex.Cr.App.1976); *Bentley v. State*, 520 S.W.2d 390 (Tex.Cr.App.1975); *Black v. State*, 513 S.W.2d 569 (Tex.Cr.App.1974); *Cherb v. State*, 472 S.W.2d 273 (Tex.Cr.App. 1971). The corroboration need only make the accomplice's testimony more likely than not. *James v. State*, 538 S.W.2d 414 (Tex. Cr.App.1976); *Bentley v. State*, supra; *Warren v. State*, 514 S.W.2d 458 (Tex.Cr. App.1974).

[10] There is ample evidence in the record to corroborate Smith's testimony other than the mere commission of the offense. We hold that the testimony of Miller and that of the other State witnesses, is incriminating, tends to connect appellant to the commission of the offense, and makes Smith's testimony more likely than not. Appellant's challenge to the sufficiency of the evidence to corroborate Smith's testimony is overruled.

Appellant next asserts the trial court erred in failing to grant his motion to quash the indictment. In his motion to quash appellant states that the indictment is insufficient in that it alleges "remuneration generally, vaguely, and indefinitely . . . absent specificity, thereby making it impossible for the Defendant to defend himself against such a cryptic and enigmatic accusation."

[11] The indictment in pertinent part alleges that the appellant on or about December 3, 1977,

> ". . . did then and there unlawfully, intentionally and knowingly cause the death of Roy Melton Ayotte by employing another, namely Arthur Smith, to commit the murder for remuneration and

the promise of remuneration and said Arthur Smith did cause the death of Roy Melton Ayotte pursuant to the aforementioned agreement by shooting him with a gun."

An indictment must allege facts sufficient to give a defendant notice of precisely what he is charged with. Art. 21.11, V.A.C.C.P. However, unless a fact is essential for notice to the defendant, the indictment need not plead the evidence relied on by the State, *Phillips v. State*, 597 S.W.2d 929 (Tex.Cr.App.1980), *Cameron v. State*, 401 S.W.2d 809 (Tex.Cr.App.1966), *Bedwell v. State*, 142 Tex.Cr.R. 599, 155 S.W.2d 930 (1941), and it is a rare exception when an indictment drawn in the language of the penal statute is legally insufficient to provide a defendant with notice of the charged offense. *Phillips v. State*, supra; *Parr v. State*, 575 S.W.2d 522 (Tex.Cr.App.1978); *Ames v. State*, 499 S.W.2d 110 (Tex.Cr.App. 1973); *Lopez v. State*, 494 S.W.2d 560 (Tex. Cr.App.1973).

V.T.C.A.Penal Code, Sec. 19.03, in part provides:

"Sec. 19.03(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

* * * * * *

"(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration."

V.T.C.A.Penal Code, Sec. 19.02, in part provides:

"Sec. 19.02(a) A person commits an offense if he:

"(1) intentionally or knowingly causes the death of an individual."

[12] The indictment in the instant case contains all of the constituent elements of an offense under the provisions of V.T.C.A. Penal Code, Sec. 19.03(a)(3). The additional information requested by appellant in his motion to quash is evidentiary and not required for purposes of notice and plea in bar. We therefore find the indictment sufficiently alleges facts to enable the appellant to prepare his defense and is not subject to a motion to quash. See *McManus v. State*, 591 S.W.2d 505 (Tex.Cr.App.1979). See and compare *Haecker v. State*, 571 S.W.2d 920 (Tex.Cr.App.1978); *Moore v. State*, 532 S.W.2d 333 (Tex.Cr.App.1976).

[13] Appellant next asserts the trial court erred in overruling his objection to the testimony of a police officer that he observed no remorse on the part of appellant. Officer Deloney testified that he had a conversation with appellant three days after the shooting of the deceased, appellant did not appear to be emotionally upset, appellant was neither crying nor weeping, "there was no remorse that he evidenced," and appellant became nervous when questioned about the rifle. Appellant's objection was made relative to appellant showing "no remorse that he evidenced" for the reason that it called for a conclusion on the part of Officer Deloney.

This Court has consistently held that when a lay opinion as to the mental attitude or emotional state of an accused is the mere shorthand rendering of the facts, the opinion is admissible as indicative of demeanor, subject to cross-examination as to the facts upon which it is based. See *Brown v. State*, 561 S.W.2d 484 (Tex.Cr. App.1978); *Ashley v. State*, 527 S.W.2d 302 (Tex.Cr.App.1975); *Miller v. State*, 145 Tex. Cr.R. 419, 168 S.W.2d 864 (1943); *Hernandez v. State*, 110 Tex.Cr.R. 159, 8 S.W.2d 947 (1927); *Willis v. State*, 91 Tex.Cr.R. 329, 239 S.W. 212 (1922); *Beaupre v. State*, 206 S.W. 517 (Tex.Cr.App.1918); *Crowell v. State*, 56 Tex.Cr.R. 480, 120 S.W. 897 (1909). We find the evidence that, after the shooting of the deceased, Officer Deloney spoke with and observed the appellant's actions and demeanor, is competent and the complained of statement describing appellant's mental attitude is merely a shorthand rendition of the facts occurring on that visit. This ground of error is overruled.

Appellant next asserts in thirteen related grounds of error that the provisions of Art. 38.14, supra, are applicable to the extraneous offenses offered in evidence by the State at the punishment stage of his trial.

We have grouped these grounds of error into three general areas whereby appellant urges that: (1) the testimony of an accomplice witness must be corroborated before it may be used to support the jury's answers to both special issues of Art. 37.071, V.A.C.C.P.; (2) the court erroneously failed to submit, after a timely request, charges on "accomplice witnesses" at the punishment stage of the trial; and (3) the evidence, excluding the testimony of the accomplice witnesses, is insufficient to sustain the jury's findings that his conduct was deliberate and that there was a probability he would commit criminal acts of violence that would constitute a continuing threat to society. Art. 37.071, supra.

Art. 38.14, supra, provides:

"A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

Art. 38.14, supra, concerns the sufficiency of evidence needed to support a *conviction* and to connect the defendant with the offense charged when the State is relying on accomplice witness testimony. Before the punishment stage of the trial is reached the defendant has been found guilty—he has been convicted—only his punishment remains to be assessed. Nothing in Art. 38.14, supra, suggests that "yes" answers to the special issues of Art. 37.071, supra, at the punishment stage of the trial cannot be had upon uncorroborated accomplice witness testimony.

Art. 37.071, supra, in pertinent part provides that at the punishment stage of a capital murder trial,

"(a) ... evidence may be presented as to any matter that the court deems relevant to sentence."

This provision has been interpreted to allow the trial judge wide discretion in the evidence that may be admitted. *Wilder v. State*, 583 S.W.2d 349 (Tex.Cr.App.1979); *Livingston v. State*, 542 S.W.2d 655 (Tex.Cr.App.1976), cert. *denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); *Gholson and Ross v. State*, 542 S.W.2d 395 (Tex.Cr.App.1976), cert. *denied*, 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977). In *Hammett v. State*, 578 S.W.2d 699 (Tex.Cr.App.1979), it was said:

"In upholding the constitutionality of the Texas death penalty procedures, the United States Supreme Court noted:

" 'Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding .... The Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death .... *What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.* Texas law clearly assures that all such evidence will be adduced.' [Emphasis added.]

"*Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)."

[14-16] Relevant information about a defendant includes admitting evidence of his "prior criminal conduct," whether or not such conduct resulted in a final conviction. *Hammet v. State, supra; Jurek v. State, supra.* Uncorroborated accomplice witness testimony falling within the range of "prior criminal conduct" would be relevant information about a defendant and we find nothing in Art. 37.071, supra, to preclude it from supporting an affirmative answer to either special issue. This Court has consistently held that the provisions of Art. 38.14, supra, are not applicable to every facet of a case that is supported by uncorroborated accomplice witness testimony. See *Russell v. State*, 551 S.W.2d 710 (Tex.Cr.App.1977) and *Moreno v. State*, 476 S.W.2d 684 (Tex.Cr.App.1972) (rule inapplicable to revocation of probation hearings); *Komurke v.*

State, 562 S.W.2d 230 (Tex.Cr.App.1978) and *Carnathan v. State*, 478 S.W.2d 490 (Tex.Cr.App.1972), V.T.C.A. Penal Code, Sec. 8.07 (rule inapplicable to testimony of a complainant that is too young to be criminally responsible for his conduct); *Cranfil v. State*, 525 S.W.2d 518 (Tex.Cr.App.1975) and *Jenkins v. State*, 484 S.W.2d 900 (Tex.Cr.App.1972) (rule inapplicable to testimony of an accomplice witness called by the accused); *Brown v. State*, 476 S.W.2d 699 (Tex.Cr.App.1972) (rule inapplicable to evidence introduced by the accused); *Saunders v. State*, 572 S.W.2d 944 (Tex.Cr.App.1978) and *Carr v. State*, 495 S.W.2d 936 (Tex.Cr.App.1973) (rule inapplicable to testimony of an accomplice witness when the accused takes the stand and admits all acts constituting the crime charged.) See also *Rice v. State*, 605 S.W.2d 895 (Tex.Cr.App.1980) (on motion for rehearing this Court withheld its ruling on whether an accomplice witness testifying at the guilt stage of a trial about an extraneous offense need be corroborated before the extraneous offense is admissible in evidence.) We hold that evidence offered to prove the special issues of Art. 37.071, supra, is not included within the provisions of Art. 38.14, supra. Therefore, the "yes" answers to the special issues of Art. 37.071, supra, are supportable on the relevant accomplice witnesses' testimony concerning the appellant's prior criminal conduct and the court did not err in failing to submit an "accomplice witness" charge at the punishment stage of the trial.

[17] At the punishment stage of the trial, the State re-offered the evidence adduced at the guilt stage of the trial. In addition, the State introduced the following evidence to show that appellant had been involved in other murder for hire schemes: Miller testified that on the night of December 2, 1977, appellant delivered a pistol to him and asked him to kill a man on Polk Street; appellant offered him $1,000 for the job. Both Miller and Smith testified that appellant had hired them to kill Howard Ross prior to Smith killing the deceased. After one of their unsuccessful attempts to end Ross' life, appellant told them, "[h]e ain't dead. I want him dead." Smith then shot Ross, but Ross did not die from the gunshot wound. When appellant discovered that Ross was still alive, he instructed them to go to the hospital where Ross was recovering and finish him off. This plan was too dangerous and they decided against killing Ross while he was in the hospital. Appellant then instructed them that Ross was going to be transferred to New Orleans and that they should shoot Ross and everyone else in the car en route to New Orleans. They refused, however, to carry out appellant's instructions and Ross was never killed. Miller and Smith also testified that appellant next wanted the deceased's father killed. And Smith further added that appellant discussed with him the killing of a merchant seaman and the killing of an unknown man whose wife wanted him murdered. We find the testimony of Smith and Miller, combined with the evidence adduced at the guilt stage of the trial, sufficiently supports the jury's determination that appellant's conduct was deliberate and appellant would commit criminal acts of violence that would constitute a continuing threat to society. Art. 37.071, supra. These thirteen grounds of error are overruled.

Appellant next asserts that the prosecutor made an improper jury argument. He says the prosecutor attempted to bring to the jury's attention matters not admissible in evidence. During the State's closing argument at the guilt stage of the trial, the following occurred:

"[PROSECUTOR]: You heard Mr. Miller testify up here, and you heard what he had to say, what the law let you hear. He could have told you—

"MR. McLEAN [DEFENSE ATTORNEY]: I object. That's something inadmissible that they couldn't hear, Your Honor.

"MR. POE [PROSECUTOR]: It's what the law lets you hear.

"THE COURT: The jury has heard the evidence.

"MR. McLEAN: May I have a ruling?

"THE COURT: Overruled.

"MR. POE: They could have asked him any question they wanted to on cross examination to impeach him, but they didn't. They wanted to come up with one conflict.

"Remember how Mr. House [Defense Attorney] came up here with that statement and folded it up really little and handed it to Miller so he would read one line? You remember that. You saw that.

"And he told you under oath there is more in that statement than what he testified to. They could ask him anything they wanted to. They say he's a big buddy and all that of Chester's. Why didn't they go into all of that stuff on cross examination? It makes you wonder, doesn't it, about what Miller knew.

"MR. McLEAN: I object to that. That's an inference that there is some inadmissible testimony the jury should have heard. That's inadmissible. I object to that."

Appellant's objection was sustained and an instruction to disregard given. His motion for mistrial was overruled.

[18, 19] An argument will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute or injects new facts, harmful to the accused into the trial proceeding. *Todd v. State*, 598 S.W.2d 286 (Tex.Cr.App.1980); *Simpkins v. State*, 590 S.W.2d 129 (Tex.Cr.App.1979); *Kerns v. State*, 550 S.W.2d 91 (Tex.Cr.App.1977). If a prosecutor's remarks during jury argument may be reasonably construed as referring to the defendant's failure to present evidence through a witness other than himself, reversal is not required. *McMahon v. State*, 582 S.W.2d 786 (Tex.Cr.App.1978); *Bolden v. State*, 504 S.W.2d 418 (Tex.Cr.App.1974); *Brown v. State*, 475 S.W.2d 761 (Tex.Cr.App.1971); *Alvear v. State*, 170 Tex.Cr.R. 378, 341 S.W.2d 426 (1960).

[20] If the prosecutor's argument can be construed to refer to inadmissible testimony, we are unable to conclude that the error is reversible under the circumstances presented in the instant case. Our reading of this record as a whole reveals overwhelmingly the guilt of appellant and we do not perceive the prosecutor's argument to have been extreme or manifestly improper, violative of a mandatory statute, or as having injected new facts *harmful to the accused* into the trial. See *Little v. State*, 567 S.W.2d 502 (Tex.Cr.App.1978); *Taylor v. State*, 550 S.W.2d 695 (Tex.Cr.App.1977). See also *Todd v. State*, supra; *Hardeman v. State*, 552 S.W.2d 433 (Tex.Cr.App.1977); *Mims v. State*, 466 S.W.2d 317 (Tex.Cr.App. 1971); *Hoover v. State*, 449 S.W.2d 60 (Tex. Cr.App.1969). *Cf. Stearn v. State*, 487 S.W.2d 734 (Tex.Cr.App.1972). As a result of the court overruling appellant's first objection, the prosecutor merely commented on appellant's failure to present evidence through the witness Miller. See *McMahon v. State*, supra; *Bolden v. State*, supra; *Brown v. State*, supra. And the sustaining of appellant's second objection followed by an instruction to the jury to disregard the prosecutor's argument sufficiently cured the later error.

[21] Appellant next asserts the trial court erred in admitting evidence seized during the search of appellant's home. After appellant's arrest and removal from his home, his wife was asked if she would consent to a search of their home. She said that she would consent and she then signed a written consent to search form that was witnessed by three Houston police officers. The search turned up a box of .30 caliber cartridges and various other papers.

In *Nastu v. State*, 589 S.W.2d 434 (Tex. Cr.App.1979), it was said:

"It is the right of every citizen to be secure in his home from warrantless searches in all but a few instances. However, '[o]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.' *Kolb v. State*, 532 S.W.2d 87, 89 (Tex.Cr. App.). But before consent can be effective, the prosecution must prove by clear and convincing evidence that the consent was given freely and voluntarily. *Bump-*

er v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *Armstrong v. State*, 550 S.W.2d 25 (Tex.Cr. App.); *Kolb v. State*, supra.

"'Whether a consent to search was voluntary is a question of fact to be determined from the totality of the circumstances.' *Brem v. State*, 571 S.W.2d 314, 319 (Tex.Cr.App.).

"*Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)."

The evidence adduced at the hearing on appellant's motion to suppress reflects that a capias issued for appellant's arrest at approximately 3:00 p. m. and that he was subsequently arrested at his home around 1:00 a. m. the next morning. Officer Hoffmaster, an arresting officer, then talked with appellant's wife to determine whether she would execute a consent to search form. He informed her that she had the right to refuse her consent and that the purpose of the search was to look for evidence implicating appellant in this offense. The consent to search form was signed by her at approximately 1:20 a. m. and it included a statement that she had been informed of her constitutional right not to have a search made. She testified that the police officers had been polite to her; they did not threaten her to obtain her consent for the search. Although appellant introduced evidence to show that his wife is or was an alcoholic, she specifically testified that she was not under the influence of any intoxicants at the time she consented to the search. Given the totality of the circumstances in this case, we find ample evidence to support the trial judge's decision that the appellant's wife voluntarily consented to a search of the premises. See *Swinney v. State*, 529 S.W.2d 70 (Tex.Cr.App.1975); *Jemmerson v. State*, 482 S.W.2d 201 (Tex.Cr.App.1972).

[22-24] Appellant also complains that the consent to search form in this case allowed the State to circumvent the warrant requirements because it was used to conduct a general exploratory search. We reiterate that a search conducted pursuant to consent is one of the specific established exceptions to the Fourth Amendment requirements of both a warrant and probable cause. *Schneckloth v. Bustamonte*, supra; *Davis v. United States*, 328 U.S. 582, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946); *Nastu v. State*, supra; *Doescher v. State*, 578 S.W.2d 385 (Tex.Cr.App.1978). The extent of a consent to search is limited by the consent obtained in a particular instance. *May v. State*, 582 S.W.2d 848 (Tex.Cr.App.1979). In the instant case, the written consent to search form authorized police officers to conduct a complete search of appellant's home and seized any letters, papers, materials, or other property they desired. This ground of error is overruled.

[25] Appellant next asserts in two grounds of error that the trial court committed reversible error in admitting in evidence a written statement of State's witness Arthur Smith. Smith was recalled by the defense and in an attempt to discredit his testimony, defense counsel read portions of a written statement Smith had made to police officers after his arrest. On cross examination, the State requested that the statement in its entirety be introduced. Appellant objected urging that the statement improperly bolstered Smith's testimony and contained references to extraneous offenses. The court overruled appellant's objections.

The record reflects, however, that the statement was later withdrawn by the court on its own motion. Outside the presence of the jury, the following occurred:

"THE COURT: As to Arthur Smith's statement, I'm going to let the record reflect the jury has not seen any of the contents of the statement and the Court is going to sustain the objection you made earlier concerning the extraneous matter and order that it be deleted, that portion of the statement which says, 'He discussed the killing with me and Miller.'

"The portion saying, 'and Miller,' will be deleted from that statement.

"MR. HOUSE: His Honor is going to go ahead and let in the rest of the statement in total? Is that correct?

"THE COURT: Let me look at that statement again.

"We will withhold the ruling at this time. Prior to the statement being given to the jury, we will make that determination. Go ahead."

A careful examination of the remainder of the record reflects that the statement was never readmitted in evidence for the jury's consideration for any purpose whatsoever. Error, if any, is thereby rendered harmless. See *Furtick v. State*, 592 S.W.2d 616 (Tex.Cr.App.1980); *Nelson v. State*, 505 S.W.2d 271 (Tex.Cr.App.1974); *Hopkins v. State*, 480 S.W.2d 212 (Tex.Cr.App.1972).

Appellant next asserts the trial court erred in admitting over objection the testimony of Rhonda Stovall that bolstered the unimpeached testimony of Smith. Stoval was permitted to testify as to statements made to her by Smith on the night of December 3, 1977, that implicated appellant in the murder.

[26] Where there is sufficient independent evidence to establish a conspiracy, hearsay acts and statements of a conspirator which are made prior to the time the object of the conspiracy is completed are admissible, *Denney v. State*, 558 S.W.2d 467 (Tex.Cr.App.1977); *Delgado v. State*, 544 S.W.2d 929 (Tex.Cr.App.1977), *Helms v. State*, 493 S.W.2d 227 (Tex.Cr.App.1973), and they are admissible even though occurring out of the presence and hearing of the conspirator on trial. *Lapp v. State*, 519 S.W.2d 443 (Tex.Cr.App.1975); *Saddler v. State*, 320 S.W.2d 146 (Tex.Cr.App.1959).

[27] The independent evidence of a conspiracy between appellant and Smith in the instant case is quite sufficient. Appellant argues, however, that "if the statements by Arthur Smith to Rhonda Stoval on the night of December 3, 1977, were after the conspiracy had ended, they were inadmissible and bolstering was the proper objection."

In *Robins v. State*, 117 S.W.2d 82 (Tex.Cr. App.1938), it was said:

"A conspiracy is not finally terminated until everything has been done that was contemplated to be done by the conspirators."

The conspiracy in the instant case did not terminate upon the completion of the murder. It was contemplated by the conspirators that Smith would receive compensation for the job. On the night of December 3, 1977, Smith had not yet received all of the compensation agreed upon; he had only been paid $150 and given the 1968 Oldsmobile. We find that the object of the conspiracy had not been completed. See *Brown v. State*, 576 S.W.2d 36 (Tex.Cr.App. 1978) (rev'd on other grounds on Motion for Rehearing); *Adamson v. State*, 21 S.W.2d 675 (Tex.Cr.App.1929). See also *Bates v. State*, 587 S.W.2d 121 (Tex.Cr.App.1979). This ground of error is overruled.

[28] Appellant next asserts he was denied his rights to a fair and impartial trial and due process of law because the State, "intentionally, knowingly, and deliberately presented patently false evidence amounting to a subrogation of perjury on the issue of whether William R. Miller was an accomplice as a matter of law" at the guilt stage of the trial. Appellant argues that because the State presented different versions of Miller's complicity in the murder of the deceased at the two stages of the trial, he was denied due process and a fair and impartial trial.

Miller's testimony at the guilt stage of the trial has already been set out in the recitation of facts. At the punishment stage of the trial, Miller testified that he was present on a number of occasions when appellant and Smith discussed killing the deceased. He was further permitted to testify that on the night of December 2, 1977, when appellant came to his trailer home with the .38 caliber pistol, appellant asked him to use the gun to kill a man on Polk Street. Appellant told him that Smith had (up until that time) failed on two or three occasions to do the job and that he would pay him (Miller) $1,000 for the killing.

Reviewing the evidence at both stages of the trial, we fail to perceive that the State presented false testimony at the guilt stage of the trial on the issue of Miller's complicity. Moreover, appellant does not present us with any specific instances of false testimo-

ny. The State merely presented a more detailed recitation of Miller's complicity at the punishment stage of the trial so that attention could be focused on the alleged extraneous offense involving appellant and Miller. At the guilt stage of the trial, it may have been an improper reference to an extraneous offense if the State had been permitted to prove that appellant had also hired Miller to kill the deceased. This ground of error is without merit.

[29] Appellant next asserts he was denied his rights to a fair and impartial trial and due process of law because the State, "intentionally, knowingly, and deliberately presented patently false evidence amounting to subornation of perjury on the issue of remuneration" at the guilt stage of the trial. Appellant argues that the State presented false evidence on the issue of remuneration through the testimony of Smith at the guilt stage of the trial.

At the guilt stage of the trial, the following colloquy occurred as Smith was being questioned about the 1968 Oldsmobile:

"Q. [PROSECUTOR]: Mr. Smith, at some time during 1977 did Mr. May approach you about doing some work for him?

"A. Yes, sir, he did.

"Q. And as part of this work that you were to do for him, was there any mention of payment or partial payment for that work being accomplished by transferring an automobile to you?

"A. Yes, sir, it was.

"Q. And was an automobile actually bought by Mr. May for the purpose of paying you for this work that you were to do for him?

"A. Yes, sir.

"Q. What kind of automobile was it?

"A. '68 Oldsmobile"

* * * * * *

"Q. Mr. Smith, did you ever receive possession of that automobile or drive it in any manner, except at the time that it was purchased, until December 3rd, 1977?

"A. No, sir, I did not.

"Q. One other thing, sir. On State's Exhibit No. 1 there is a block that says: 'Date Issued.' What is that date, sir?

"A. 9-14-77.

"Q. September 14th, 1977?

"A. Right.

"Q. Does that sound consistent with the time that you and Mr. May bought that automobile, sir?

"A. Yes, sir, it does.

"Q. Shortly after that time, Mr. Smith, did the defendant begin talking to you about a job, shall we say, in relation to Roy Ayotte, Jr.?

"A. Yes, sir, he did.

"Q. What was the nature of the job that he wanted done, sir?

"A. He wanted him shot.

"Q. Did he want him killed, sir?

"A. Yes, sir, he did."

At the punishment stage of the trial, the following colloquy occurred as Smith was being questioned about the 1968 Oldsmobile:

"Q. And, Mr. Smith, you testified previously in this case that the '68 Oldsmobile that was given to you by Mr. May was actually bought for another job. What was that job, sir?

"A. For Howard C. Ross."

Reviewing Smith's testimony at both stages of the trial, we are unable to say that the State presented false evidence at the guilt stage of the trial on the issue of whether the 1968 Oldsmobile was partial remuneration for the murder of the deceased. The fact that the car was originally purchased as remuneration for another killing does not preclude it from eventually becoming remuneration for this killing. Moreover, at the guilt stage of the trial, it may have been an improper reference to an extraneous offense if the State had been permitted to prove that the car was actually bought by appellant to serve as remuneration for the killing of Ross. Smith's testimony at the guilt stage of the trial merely establishes that the car was purchased in September by appellant for a "job" that he was to do for appellant. Shortly thereafter,

appellant asked him to kill the deceased and the car was then used as partial remuneration for this offense. At the punishment stage of the trial, Smith testified that the car was actually purchased before the attempted killing of Ross; he and appellant discussed killing Ross in September, prior to any discussion concerning the killing of the deceased. He had attempted to kill Ross on three occasions and having failed to kill Ross he was then told by appellant to kill the deceased and the car became partial remuneration for this offense. This ground of error is without merit.

[30] Appellant next asserts that the State's failure to disprove the statement of Smith at the punishment stage of the trial that the 1968 Oldsmobile "was remuneration for another offense and not for the instant offense was such exculpatory substantive evidence that a reversal is mandated." We reiterate that at the punishment stage of the trial, Smith testified that the car was originally purchased to serve as partial remuneration for the killing of Ross; he did not testify that the car was in fact the remuneration for that offense rather than the instant offense. The State, therefore, had nothing to disprove other than the fact that the car was not used for the original purpose for which it was bought.

At the guilt stage of the trial, Smith testified that he received the car as partial remuneration for the instant offense. His testimony was corroborated by other circumstances in the case. We find that the testimony of Smith plus the corroborating evidence at the guilt stage of the trial was sufficient to disprove that the car was remuneration for another offense and sufficient to prove that the car was partial remuneration for the instant offense. See *Granger v. State*, 605 S.W.2d 602 (Tex.Cr.App.1980); *McManus v. State*, supra.

Appellant next asserts the trial court erred in admitting over objection the testimony of Mizelle Miller, an inmate at the Harris County Detention Center. Appellant urges that the trial court violated the provisions of Art. 38.22, V.A.C.C.P.; he relies on *Jimmerson v. State*, 561 S.W.2d 5 (Tex.Cr.App.1978), and *Easley v. State*, 493 S.W.2d 199 (Tex.Cr.App.1973).

Prior to Mizelle Miller testifying, appellant called three Harris County inmates to the stand and they all testified that Smith had told them that he killed the deceased in the course of a robbery. The State then called Mizelle Miller as a rebuttal witness and he testified that appellant had told him during their incarceration that he would receive free legal assistance if he would perjure himself at the trial and testify that Smith had told him that he (Smith) killed the deceased in the course of a robbery.

Prior to the 1977 amendment to Art. 38.22, supra, effective August 29, 1977, there was a long standing rule that an oral statement of an accused, whether made in response to an interrogation or not, while "in jail or other place of confinement or in the custody of an officer," was *ipso facto* inadmissible unless it fell within a statutory exception to Art. 38.22, supra. Oral statements made by an accused to jail inmates concerning a crime for which the accused was in custody did not fall within one of these statutory exceptions and were therefore inadmissible. *Jimmerson v. State*, supra; *Easley v. State*, supra.

[31] The 1977 amendment to Art. 38.22, supra, now provides that the limitations of the statute apply only to statements that are the product of custodial interrogations; a voluntary oral statement is admissible if it is not the "result of" or does not "stem from custodial interrogation." The statement from appellant to Mizelle Miller, which was made well after the effective date of the amendment, was not the product of a "custodial interrogation," as that term is defined in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See *Newberry v. State*, 552 S.W.2d 457 (Tex.Cr.App.1977); *Bailey v. State*, 532 S.W.2d 316 (Tex.Cr.App.1975). Moreover, there is no evidence that Mizelle Miller was ever acting as an agent of law enforcement officials in his conversation with the appellant. We therefore find the appellant's statement to Mizelle Miller was properly admitted in evidence over appellant's objec-

tion. See Bubany, The Texas Confession Statute: Some New Wine in the Same Old Bottle, 10 Tex.Tech.L.Rev. 67, 73–6 (1978). *Cf. Jimmerson v. State*, supra at 8, note 1.

[32] Appellant next asserts the trial court improperly excused prospective juror Anthony Rein in violation of *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). A careful review of the record, however, reflects that no objection was raised to the exclusion of Rein. Failure to object to the improper exclusion of a potential juror waives such error on appeal. *White v. State*, 610 S.W.2d 504 (Tex.Cr.App. 1981). See *Evans v. State*, 614 S.W.2d 414 (1980); *Crawford v. State*, 617 S.W.2d 925 (1980.)

[33] Appellant next asserts in three grounds of error the trial court improperly excused prospective jurors R.L. Schlosser, Clarence Ellis, and D.C. Merdian in violation of *Adams v. Texas*, supra. A careful review of the record reflects that no specific objections were made by appellant to the State's challenge for cause that any of the prospective juror's exclusions were inconsistent with *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Rather, appellant's objections were directed to the disqualification of the jurors under V.T.C.A. Penal Code, Sec. 12.31(b). We find that the appellant's failure to specify in his objections that the juror's exclusions were inconsistent with *Witherspoon* waived such error on appeal. See and compare *Evans v. State*, supra.

The judgment is affirmed.

ROBERTS, Judge, dissenting.

I agree with Judge Clinton that the objections made during voir dire were sufficient to have preserved the grounds for review. *See generally* my dissenting opinion in *Crawford v. State*, 617 S.W.2d 925, 937 (1980). Venire Member Schlosser was excused on an improper basis. Because of the violation of the Sixth and Fourteenth Amendments, the judgment should be reformed to confinement for life. *Evans v. State*, 614 S.W.2d 414, 418 (1980) (Roberts, J., dissenting), reh. denied April 29, 1981.

CLINTON, Judge, dissenting.

In the final grounds of error treated by the majority opinion, the merits of appellant's complaints regarding the State's exclusion of veniremen R. L. Schlosser, D. C. Merdian and Clarence Ellis are avoided by asserting that a careful review of the record reflects that his objections "were directed to the disqualification of the jurors under V.T.C.A. Penal Code, § 12.31(b);" thus, according to the majority, appellant's failure "to specify in his objections that the jurors' exclusions were inconsistent with *Witherspoon* waived such error on appeal."

It seems to me that evasion of meritorious claims on this basis is nothing more than a semantical variation on the late notion that V.T.C.A. Penal Code, § 12.31(b) and *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) are "separate and independent bases for excluding jurors in Texas." Whatever inadequacy a majority of the Court might otherwise attribute to the Supreme Court's guidance in the realm of capital jury selection, it cannot be gainsaid that the premise offered by the majority opinion here, in its quietus, has already been constitutionally interred:

> "As an initial matter, it is clear beyond preadventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. *Witherspoon*.... While this point may seem too obvious to bear repetition, it is apparent from their frequent references to *Witherspoon* as a ground for 'disqualifying' prospective jurors that the State, and the Texas Court of Criminal Appeals, might have fallen into the *error of* as-

suming that Witherspoon and § 12.31(b) are both grounds for exclusion. . . ."[1]

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 2527-2528, 65 L.Ed.2d 581 (1980).

The idea that *Witherspoon* and § 12.31(b) may coexist as separate and independent bases for excluding capital veniremen was specifically rejected because § 12-31(b) focuses the inquiry on the prospective jurors' "attitudes," "opinions," "beliefs" *regarding* the *death penalty*; thus § 12.31(b)—like any other criterion which so focuses the inquiry—falls *within* the scope of *Witherspoon*. And the scope of *Witherspoon* constitutes "a limitation on the State's power to exclude" prospective jurors because of their "views about capital punishment." *Adams*, supra, 448 U.S. at 48, 100 S.Ct. at 591.

In view of the fact then that *Witherspoon* identifies not a ground for disqualification, but a constitutional limitation on *the application* of *any* ground of exclusion which focuses on attitudes about capital punishment, it seems that appellant's objection—as described by the majority—was the hypertechnically correct one: that the jurors were being excused under an *impermissible application* of § 12.31(b), and thus were not excludable thereunder at all. As the Supreme Court specifically stated,

> "The State could, consistently with *Witherspoon, USE § 12.31(b)* to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the *USE of § 12.31(b)* to exclude jurors on broader grounds based on their opinions concerning the death penalty *is impermissible*." *Adams*, 448 U.S. at 48, 100 S.Ct. at 2528.

In sum then, I have no disagreement with the majority opinion's characterization of appellant's objections, for it is clear to me that his complaints were indeed being directed to juror exclusions under impermissible, incorrect and unconstitutional applications of § 12.31(b).[2] But the majority opinion's conclusion—having no more substance than its apparitional premise—entirely dissipates on closer inspection.

Indeed, the very inspection suggested, though not undertaken, by the majority opinion itself is the most appropriate: "a careful review" of the voir dire testimony supplies the context and, thus, the meaning of the objections voiced and the understanding of all parties concerned. The voir dire examination of venireman Schlosser is illustrative of the point. It is treated fully in Appendix "A," to which the reader is now referred.

Easily discerned from the examination of Schlosser is the focus of interest on the part of the questioners. The trial judge, as he stated and his questions clearly indicated, felt that what was really in issue was whether the juror could say that his deliberations on fact issues would not be "affected" by the possibility of the death penalty. V.T.C.A. Penal Code, § 12.31(b). Ultimately sensing this, the prosecutor abandoned his leading attempt to exclude Schlosser on the ground that he had "a bias . . . against [a] phase of the law upon which the State is entitled to rely," Article 35.16(b)(3), V.A.C.C.P., and citing *Hovila v. State*, 562 S.W.2d 243 (Tex.Cr.App.1978), challenged for cause upon Schlosser's unwitting incantation that his "deliberations would be affected."

Clearly, the majority correctly analyzes the record by referencing the disqualification of Schlosser as being "under 12.31(b)." But just as the record discloses the basis for the prosecutor's challenge for cause, so too does it reveal defense counsel's ground of objection thereto.

Indeed, there is nothing oblique about the preceptive orientation of defense counsel's

1. All emphasis is n..... ..less otherwise indicated.

2. The only other possible meaning of an objection "directed to the disqualification . . . under . . . § 12.31(b)" would be that the defense believed the jurors had stated their deliberations would *not* be affected and were *therefore not* excludable under § 12.31(b) *as that provision was being interpreted* at the time. This, however, cannot be seriously advanced simply because the voir dire testimony reflects otherwise. See Appendix "A" post.

concern; the genesis of *every* question he put to Schlosser was the Supreme Court of the United States' decision in *Witherspoon v. Illinois*, supra: would the juror *consider* the death penalty in a proper case; would he *automatically* vote against imposition of capital punishment regardless of the evidence; could he *follow the law* as given and instructed by the court? And indeed whatever "equivocation" this record reflects on the part of Schlosser, it was never in his responses to defense counsel's questions.

In *Zillender v. State*, 557 S.W.2d 515, 517 (Tex.Cr.App.1977), it was stated:

> "The generally acknowledged policies of requiring specific objections are twofold. First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it.[1] Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony. * * Thus, *where the correct ground of [objection] was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection.*

[1] A collateral but important ramification of this function is to provide the trial court with an opportunity to attempt to cure any harm resulting from the action giving rise to the objection. [Citations omitted]."

Does the majority seriously contend that it was not obvious both to the trial court, and the prosecutor that defense counsel believed the venireman was being excused in violation of *Witherspoon*? Clearly, neither the prosecutor nor the trial judge felt that the limitations on exclusion established by *Witherspoon* constituted "the test" in Texas, in view of the approved application of § 12.31(b), supra, by this Court.[3] But that does not mean they failed fully to appreciate *appellant's* position on the matter.

Indeed, the prosecutor, having been "afforded an opportunity to remove the objection or supply other testimony" took a different tack, easily maneuvering Schlosser's "bias" (as the prosecutor characterized it first) against death as a punishment for a non-trigger capital defendant, into the "magic words" he knew the trial court would act on and this Court would approve. In short, it is clear that nothing done here would have differed had defense counsel uttered the word *"Witherspoon."*

Schlosser was—in the classic sense—an *"Adams* juror." Not once did he depart from his initial statements that he believed in capital punishment in appropriate cases, would follow the law, would consider imposition of the death penalty, and would never automatically vote against its imposition. Yet, with ease he was excluded because he could not swear that his scruples, his hesitancy to be involved in the process, would not "affect" him. It was this recurrent anomaly in Texas cases which finally forced the hand of the United States Supreme Court.

According to *Adams*, the State has no "legitimate interest" in excluding jurors who would follow the law and abide by their oaths *notwithstanding* their opinions or beliefs about capital punishment; further, the implementation *by the State* of any "practice" which exceeds that "legitimate interest," "seriously prejudice[s]" the accused. *Adams*, supra, 448 U.S. at 43, 100 S.Ct. at 2525, 65 L.Ed.2d at 588. In the instant case, the defendant's objection was more than adequate to convey his belief that the State had failed to show itself entitled to the exclusion of venireman Schlosser.

Furthermore, defense counsel was correct: The State did not show its entitlement to the exclusion and the trial court erred by excusing Schlosser on the State's

3. As of the date of the voir dire here, this Court had held, then reaffirmed, that when a veniremember was excludable under the "State statutory" ground for disqualification, § 12.31(b), it was "unnecessary to consider" the prospective juror's "qualification" under *Witherspoon*. E. g., *Hovila*, supra; *Shippy v. State*, 556 S.W.2d 246 (Tex.Cr.App.1977); *Burns v. State*, 556 S.W.2d 270 (Tex.Cr.App.1977), *relief granted sub nom. Burns v. Estelle*, 592 F.2d 1297 (5 CA 1979), *rehearing en banc granted*, 598 F.2d 1016 (5 CA 1979), *order granting relief aff'd*, 626 F.2d 396 (5 CA 1980) and *Moore v. State*, 542 S.W.2d 664 (Tex.Cr.App.1976).

challenge for cause.[4] *Adams*, supra. I would hold that the disqualification of Schlosser alone requires vacation of the death sentence. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).[5]

As in the case of venireman Schlosser, the record discloses that Merdian was fully qualified to sit on the jury which tried appellant for capital murder; conversely, the record does not indicate that the State met its burden of establishing its entitlement to his exclusion. *Witherspoon*, supra. The State's practice, as revealed by this record, seriously prejudiced appellant by depriving him of his constitutional right to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 10 of the Constitution of this State. *Adams*, supra.

At a time when the Court should lead the effort to repair the damage this State has sustained through the unchecked use—recently condemned—of § 12.31(b), an attempt to continue its sanction by the majority opinion seems uncommonly inappropriate. I am therefore constrained to dissent to the invitation extended by the majority opinion for the spectre to haunt us for many years to come.

TEAGUE, J., joins.

APPENDIX "A"

After introducing himself and the attorneys, and advising Schlosser of the charge against appellant, as well as the mandatory penalties, the trial judge continued,

"Now, would the fact that the ... two possible punishments of death or life ... would that affect your deliberations on any fact issue in the case? * * *

I'm really trying find out *how you feel about* the imposition of *the death penalty. Now you would be disqualified unless the penalties* of death or imprisonment for life *will not affect your deliberation on any issue of fact.*

Would the mandatory penalty of death or life imprisonment *affect your deliberations* on any issue of fact?

A: *No sir.*"

The court informed Schlosser that the attorneys would "go into the principles of law involved" in the case and cautioned that the jury is required to take an oath to follow those principles and base its decision "solely upon the evidence." At this point the prosecutor took over, and during his preliminary comments told Schlosser that appellant was indicated for hiring another to kill the alleged victim; he explained that such conduct constituted a capital offense in Texas. He then asked Schlosser whether he "agreed or disagreed" with that law. Schlosser replied that "it may be more the responsibility of the man that actually pulled the trigger." The prosecutor replied:

"Now, the law provides that the person who does the hiring is subject to the maximum penalty of life or death also. * * * This Defendant is charged with that. He is not charged with doing the murder itself.

4. Apropos of the exclusion of Schlosser is the following passage from *Witherspoon*, 391 U.S. at 522, n. 21, 88 S.Ct. at 1777 n. 21:

> "Just as veniremen cannot be excluded from cause on the ground that they [voice general objections to the death penalty or express conscientious or religious scruples against its infliction], so too *they cannot be excluded for* cause simply because they *indicate* that *there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him.* The most that can be demanded of a venireman is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."

5. As further illustrative of the abuse of § 12.31(b), supra, that the decision of the Supreme Court in *Adams*, supra, is patently designed to check, I will address the voir dire examination of venireman Merdian in Appendix "B," but suggest to the Court that it not be published in the interest of space considerations. For simple brevity, I pretermit completely discussion of venireman Ellis.

APPENDIX "A"—Continued

A: *I would have to follow the law as a Juror.*

Q: • • • *Could you follow the law if the Court tells you that the Defendant or the person that does the hiring is subject to the ... penalties of death or life imprisonment?*

A: *Yes sir.*

Q: • • • I'm not going to try to talk you into a position one way or the other. • • • If you disagree with the law or if you think in your own mind you couldn't put out of your mind the way you feel, that's fine. • • • Now if you disagree with [the law] or if you don't think that that ought to be the law or you don't think looking in your own mind, as only you can, that you could be fair to the State, we would just like to know about it now.

A: *Well, I believe in capital punishment. If a man sheds another man's blood, then by that man that blood should be required. It seems to me that the man that actually did the murder would be the one ... subject to capital punishment.*

Q: Under our law he is [too]. • • What are your feelings about the person who actually does the hiring?

A: *I would have to go by the law. I'm here to abide by the law.*

Q: *But how are your feelings?*

A: I couldn't ... give you a yes or no answer on that ... without studying it and thinking about it.

Q: Well ... after you are on the jury that's too late to give us an answer. That's what this is all about ... is to see *how you feel.* • • • We will take as long as you want. • • • If you don't think, sir, that you could sit fairly on that type of jury, just let us know. *I know you will obey the law as best you could,* but sometimes our personal feelings, you know, are important to us. However you feel makes no difference to me. if you can, fine. If you cannot, just let us know.

A: *I really couldn't decide* ... right now ... on whether I could sit, you know, with an open mind on his situation.

THE COURT: He's not asking you what you are going to do in this case. He is asking you about your *attitude toward capital punishment* • • •. The question is: Do you believe in capital punishment as applied to a person who hires ... someone to do the killing?

MR. SCHLOSSER: That's where my problem is.

THE COURT: *You have to answer—*

MR. SCHLOSSER: *I don't think I could.*

MR. POE [Prosecutor]: Excuse me. Are you through, Your Honor?

THE COURT: Yes.

BY MR. POE:

Q: • • • *The answers that we need from you are yes or no.* I know it's human nature—and I say it all the time—I believe I could, I think I could, and that type of thing, or I don't think I could.

But the judge, in order to make a ruling [of] law, requires you to answer yes or no to the questions.

• • • • • •

So I will just ask you again. Knowing what you know, that *the Defendant is not the trigger man in this case, I will tell you he's not,* but he is charged with capital murder—

MR. HOUSE [Defense Counsel]: I object to this type of questioning. The problem is he's getting into the facts of the case.... If he wants to present it in a hypothetical type question, that's fine.

MR. POE: I have a right to tell him what he is charged with.

THE COURT: Overruled.

MR. SCHLOSSER: *I would have to say no.*

Q: *You could not sit fairly to the State* knowing that the Defendant is charged with doing the hiring as opposed to actually pulling the trigger; is that right?

A: *Right.*

APPENDIX "A"—Continued

Q: *I think that was a yes answer?*

A: Yes.

Q: And you have thought about this and you have come to the conclusion in your own mind, that *you really couldn't be totally fair to the State because of the nature of the offense he is charged with*; is that correct?

A: *That's correct.*

Q: And *although you could be totally fair in another type of capital murder case*, you could not be fair in this case because he is not the trigger man?

A: That's correct.

Q: *Is that your answer for the Record and for the Court?*

A: Yes.

Q: I take it I could spend the rest of the day talking to you about that and that would still be your answer, *would it not?*

A: Yes.

MR. POE: *We will challenge him, Your Honor.*

BY MR. HOUSE:

Q: Mr. Schlosser, the question really boils down to the fact that in a proper case, regardless of what the circumstances may be—because you don't know the circumstances and you don't know the facts and you won't know until you hear it coming from the witness stand—you understand that—but the question is: *In a proper case—can you think of any case that would be proper in which you could consider the death penalty for a person who allegedly hired someone to kill someone else?* In other words, *you are not just saying that automatically you wouldn't vote for the death penalty; you could consider it?* That's what I'm trying to find out.

A: You ask some hard questions. Would you repeat that?

Q: Sure. *The key question* here as I see it *is whether or not in a proper case* —and we don't know what it could be—you could conjure up all kinds of horrendous things in your mind—you need to do that while I'm asking you this question—but in a proper case *could you consider assessing the death penalty as a proper punishment* if that was in fact an element of the punishment for a person who allegedly hired someone to kill someone else? In other words, *you wouldn't just automatically vote no to the death penalty; you could in fact consider it in a proper case? Is that true?*

A: Yes.

MR. HOUSE: I will object to the challenge.

MR. POE: May I have a moment?

THE COURT: Yes.

BY MR. POE:

Q: My question was: Could you be fair and you told me you couldn't really be fair to the State because of the way you feel. *And apparently Mr. House talked to you a little different and a different aspect comes in.* I'm just trying to ask you: Can you be totally fair to the State knowing that the Defendant didn't do the shooting? * * * And I believe you told me that you couldn't really be fair starting out to the State; *you have some type of bias*, maybe, against that type of offense being capital murder; *is that right? Is that right?*

Is that what you told me?

MR. HOUSE: I object to the form. The question has to be captioned in terms of *whether or not you could consider the death penalty.* * * * I don't agree with that statement. I think it's *whether or not he could consider it in a proper case.*

THE COURT: *I'm inclined to agree with you, Counsel. I think the issue here is whether you comply with the 1231.*

MR. POE: The State has the right, as well as the Defense, to have 12 unbiased Jurors in any criminal case, whether it's a capital offense or misdemeanor.

THE COURT: Let me ask you one more questions. [sic]

APPENDIX "A"—Continued

Mr. Schlosser, in a murder for hire case if you were selected as a Juror, *you could not under any circumstances*, as I understand it, *vote and inflict the death penalty for a person who hired someone else to commit murder regardless of what the facts are*? You could not do it; is that what you are saying?

MR. SCHLOSSER: Well, he mentioned—

THE COURT: You answer my question.

MR. SCHLOSSER: *I want to explain my answer.*

THE COURT: *We don't care—it really doesn't matter why you feel.* We want to know how you feel. Everybody is entitled to his own opinion. You don't have to justify it.

* * * *Can you*, if you were selected as a Juror, *under any imaginable set of facts vote to inflict the death penalty on a person convicted of hiring someone else to commit murder*? That's the question.

MR. SCHLOSSER: *Not under any circumstances*, no.

MR. POE: I renew my *challenge*.

THE COURT: I *sustain* the challenge.

MR. HOUSE: I *object* to the sustaining of the challenge.

Defense counsel, obviously skeptical that communication was occurring, continued, asking Schlosser whether he had understood the Judge's question. He explained that what is crucial is that "*you wouldn't just automatically vote* [*against the death penalty*]; could you in fact *consider* . . . assessing the death penalty if it was a proper case under the proper circumstances?" Schlosser replied, "*Certain conditions I could think of where I could and certain where I couldn't.*" Defense counsel at this point stressed to Schlosser the fact that,

"You don't know the facts of this case or any other case. But there are cases that you can imagine that *you would* definitely *consider*, as I understand it, *assessing the death penalty to a person who allegedly hired someone to kill someone else*? You would as to the person who allegedly hired him, *consider the death penalty*; is that right?

A: *Yes.*

Q: *There are certain cases where that's true?*

A: *Yes.*

MR. HOUSE: I think he qualifies.

MR. POE: Let me ask some questions. * * * *It seems like each one of us got a different answer.* * * * Do you have some difficulty or problem with [the law that the person who does the hiring is subject to the death penalty]?

A: *Yes. Like I told you at the start, I disagree with that.*

* * * * * *

Q: The fact that you feel that way means that *you would carry that feeling throughout the trial*, wouldn't you?

A: *Yes, sir.*

Q: *I hate to use the word bias.* * * * But you feel in your own mind that you wouldn't really put that feeling aside because *we can't really put our feelings aside; that's impossible*; is that right?

A: *That's right.*

Q: * * * And if you are a Juror in this case *would you be able to put that aside* or not? If you can't, *just tell the Court.*

A: *No, sir.*

MR. POE: It will be a *challenge for bias.*

MR. HOUSE: I need to ask a couple more questions. * * * Mr. Schlosser, you have already indicated that there are certain cases in which *you could consider the death penalty* [as a proper punishment] for the person who allegedly hired . . . another person to kill a third party—as a proper punishment?

A: *Yes.*

Q: Now, the question here is: Even though you have a bias, the question is: *Can you follow the law*? The Judge is going to give you the law and if that law is that . . . the State is seeking the death penalty on a particular individu-

APPENDIX "A"—Continued

al, the question is: *Can you follow the law and consider the death penalty despite your bias?* Because we all got biases.

A: A bias—*I have been influenced by biases. The law is not always perfect.*

• • • • • •

Q: The question is whether or not, because of your bias, you would *automatically veto a consideration of the death penalty* in this type of case, . . . [murder for hire] as to the person who hired him *if in fact it were a proper case* and *whether* or not *you could follow the law* . . .?

A: Well, *I think I would still be influenced by bias.*

Q: Could you set aside your bias and *follow the law* and at least *consider the death penalty* . . .? In other words, would you *automatically veto the death penalty* or the consideration of [it] because of your bias?

• • • • • •

A: *I couldn't automatically veto.*

Q: *So you would consider it?*

A: *Yes.*

Q: So your bias itself could be overcome in a proper case; is that what you're saying?

• • • • • •

A: *I couldn't answer yes or no* on that because you are always influenced one way or another.

Q: But the question is, Mr. Schlosser, *could you follow the law and* in a proper case *consider the death penalty* despite your bias? *That's the real question.*

A: *Yes, I could.*

MR. HOUSE: *I object to the challenge.*

MR. POE: One more question.

• • • • • •

Q: You disagree with the law, is that correct?

A: Yes.

Q: Can you answer out?

A: Yes.

Q: And you have a strong feeling that *it would affect your deliberations in the case;* is that right?

A: *Right.* My bias.

Q: We call it bias. I hate to use that term. But let's call it that because we know what we're talking about. • • • [If you] had to make the decision whether it was a death penalty or life imprisonment, *the way you feel would really affect your deliberations, wouldn't it?*

A: *Yes, sir.*

Q: *We are not talking about . . . whether or not you could follow the law* because you would be a Juror and you would be sworn to follow the law. *I'm talking about your bias affecting your deliberations.* It would affect you, wouldn't it?

A: Right. *Yes.*

MR. POE: Thank you. It will be a challenge.

MR. SHAVER [Prosecutor]: In support of that, Your Honor, we would like to show Avila vs. State, which was returned by Criminal Court of Appeals on February 8th of this year.[1] *The very question was answered that way.*[2]

At this juncture, the trial judge was shown the opinion in question; thereafter, he stated, "All right. The Court will sustain the challenge. You will be excused, Mr. Schlosser."

1. This reference is apparently to *Hovila v. State*, 562 S.W.2d 243 (Tex.Cr.App.1978).

2. In *Hovila*, supra, Venireman Glass was held to have been appropriately excluded on the State's challenge for cause under § 12.31(b), supra, because it was clear that his "perception of the facts" would be "affected" by the mandatory penalties. Similarly, the exclusion of Venirewoman Boyd was upheld because her voir dire examination disclosed that she would be "unconsciously deceptive."

Both Glass and Boyd—like Schlosser in the instant case—readily admitted that the possibility of the death penalty would "affect" their deliberations.

But defense counsel objected to the court's ruling before he could question the venireman further. The trial court told him to go ahead. Counsel elicited reaffirmations from Schlosser that he did believe in the law of capital punishment, that he personally disagreed with the law in the respect previously discussed, and then asked,

"Q: But the question is: Despite your bias or your disagreement with that law, *could you follow the law?*

MR. POE: I object to that. *That is not in issue.*

THE COURT: *Sustained.*

Defense counsel then requested an opportunity to make a bill of exceptions.

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NO. 81-5383

IN THE

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OCTOBER TERM, 1981

ROBERT ALLEN MAY,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether this Court should consider a matter to which no contemporaneous objection was made in the trial court as required by state law.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari files this brief in opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals affirming Petitioner's conviction for capital murder is attached to the petition as Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claims are based on the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in agreement with Petitioner's abbreviated statement of the case. The only facts relevant to the issue presented concern the exclusion of certain venire members and whether defense counsel objected thereto on the basis of Witherspoon v. Illinois, 391 U.S. 510 (1968) as required by state procedural law. Petitioner apparently concedes that no objections were made on the proper ground.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to consider the issues presented.

Petitioner's failure to make contemporaneous objections as required by state law to the exclusion of prospective jurors precludes review of those matters in this Court. The State has a legitimate interest in requiring the parties to object to the exclusion of any juror during voir dire examination. Petitioner should not be allowed to complain now about a matter which he did not find objectionable at trial.

ARGUMENT

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons, and none exists.

II. THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH NO CONTEMPORANEOUS OBJECTION WAS MADE AT TRIAL AS REQUIRED BY STATE LAW.

This Court has consistently declined to review matters to which no objection was made at trial, when state law requires such objection. The failure of a defendant to present a federal question in conformance with state procedure constitutes an

adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978). The Texas Court of Criminal Appeals held that Petitioner had waived his contention that certain veniremen were excluded from the jury panel in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). At the time of Petitioner's trial, Texas state law was settled that the failure of a defendant to voice a contemporaneous objection to the exclusion of a venireman in violation of Witherspoon waived the consideration of the error on appeal. Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976).

Contrary to Petitioner's assertions, the state court had not held that an objection to the exclusion of a juror pursuant to a state statute, Tex. Penal Code Ann. §12.31(b), was without merit. Rather, prior to this Court's decision in Adams v. Texas, 448 U.S. 38 (1980), the state court had recognized Section 12.31(b) to be an independent state ground for the exclusion of prospective jurors. An objection on federal constitutional grounds, however, has always been necessary under Texas law to preserve a federal constitutional claim.

The state has a legitimate interest in requiring the parties to make a contemporaneous objection to the exclusion of jurors during voir dire examination. Voir dire examination and the selection of a jury, perhaps more than any other event at trial, is an exercise in trial strategy for the parties. The decisions of counsel whether to accept a juror, to challenge a juror for cause, or to exercise a peremptory challenge are all matters of trial tactics and strategy. There are many reasons why defense counsel might decline to object to the exclusion of a prospective juror. A real possibility exists in every case where no objection is made that defense counsel did not want the juror to serve, and declined to object to the exclusion because of the risk that the juror would then be rehabilitated, which would then necessitate the use of a valuable peremptory challenge in order to remove the juror. In the instant case, it cannot be assumed

that the yet unestablished defect in Section 12.31(b) found by this Court in Adams v. Texas, was the only reason that defense counsel failed to object to the exclusion of the veniremen in question.

Federal courts have also recognized that reliance on a particular state of the law at the time of trial does not, by itself, constitute cause justifying excuse from the waiver caused by the failure to object. Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981)(en banc); Dumont v. Estelle, 513 F.2d 793 (5th Cir. 1975); Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974). In Dumont v. Estelle, the court stated that this rule must apply or later, "the courts would face the complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver." 513 F.2d at 798.

This Court has consistently recognized the state's interests in requiring contemporaneous objections to objectionable matters at trial. See, Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973); Henry v. Mississippi, 379 U.S. 443 (1965). In Davis, the Court held that absent a requirement that the parties make contemporaneous objections in orders to preserve error, the parties would have little incentive to make such objections and,

> [s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thoughts that if these hopes did not materialize, the claim could be used to upset an otherwise valid conviction at the time when reprosecution might well be difficult.

411 U.S. at 241. This is especially true where the asserted error involves jury selection proceedings, in which there are a multitude of tactical and strategic reasons why counsel specifically would not want to object to the exclusion of a juror at all. For example, in the instant case, Petitioner did not persist in his objections at trial. Following defense counsel's initial objections, the cautious trial judge allowed him to conduct further questioning. When the State's challenge for

cause was sustained following additional examination, counsel failed to re-urge his previous objections. This Court should decline to review a matter to which no proper objection was made in the state courts.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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